

Chapter 2: The ticking bomb scenario: Evaluating torture as an interrogation method

Michelle Farrell

Abstract

Revived by the events of 11 September, the ticking bomb scenario and the underpinning attention to torture as a method of interrogation have become ubiquitous in public and academic debate. Beyond the debates, the ticking bomb scenario also continues to underpin policies of torture. It is frustrating that so much attention, and credibility, is given to this category of so-called 'interrogational torture'. We remain far from understanding the practice. This chapter shows how the ticking bomb hypothetical inhibits understanding of the practice of torture and how it operates to neutralise the ideology of torture. The acceptance of the ticking bomb scenario as a legitimate point of debate, and as a legitimate basis of policy, simultaneously and paradoxically, facilitates the practice – torture is greeted as exceptional rather than understood as a continuous practice of violence. By exposing the ideology, it is possible to reveal the way in which the ticking bomb scenario serves as a more palatable proxy for the erasure of 'political subjectivity', and the creation of new political subjectivities, in the 'war on terror', in the Empire and in the metropole. Torture is not about information and is not a method of interrogation. Torture is about the subjugation, pacification or correction of those constructed as not fully human, barbarians or sinners. The ticking bomb scenario, like the torture it encodes, is an instrument of the civilising mission.

Introduction

*'...all these prisoners who have been tied up and "interrogated" ...'*²

Whilst there are numerous adaptations of the ticking bomb scenario,³ the construct generally refers to a hypothetical situation in which an individual has been detained and the authorities believe, or are certain, that the individual has the information to prevent an impending attack which will kill or injure many people. The individual is unwilling to disclose the information in interrogation. The authorities believe that the information can be obtained through torture. The hypothetical asks, in such a scenario, is it justifiable to torture the individual in order to save lives?⁴

Revived by the events of 11 September, the ticking bomb scenario and the related question of torture as a method of interrogation have become ubiquitous in public and academic debate.⁵ These debates should not be treated lightly. This discussion ought to give rise to considerable unease. My sense of unease is twofold. First, writing about this issue at all is unsettling. Why are we giving so much attention to the ticking bomb scenario whilst others are undertaking the

¹ I would like to thank Robert Knox, Thomas Beaumont, Kathleen Cavanaugh and Elvira Dominguez-Redondo for extremely useful, thoughtful and provocative comments on drafts of this chapter. I also owe special thanks to the editors of this collection for their support. In particular, I would like to thank Malcolm Evans for extensive and productive comments as the work progressed. Errors are, of course, all mine.

² Aimé Césaire (Joan Pinkham trans), *Discourse on Colonialism* (Monthly Review Press, 2000) 35.

³ For a collection of the various ticking bomb scenarios which have been proffered in the literature, see Yuval Ginbar, *Why not torture terrorists? Moral, practical, and legal aspects of the 'ticking bomb' justification for torture* (Oxford: Oxford University Press, 2008) 379-386.

⁴ Michelle Farrell, *The Prohibition on Torture in Exceptional Circumstances* (Cambridge University Press, 2013) 7.

⁵ The geography of this debate is important. Sometimes described as a global debate, it is more accurate to describe it as quite geographically limited, particularly to the United States, and, to a lesser extent, to so-called Western countries including the United Kingdom, Germany, Australia and Israel.

urgent task of thinking about how to enforce the prohibition on torture, or of working to prevent torture, and to protect and treat victims? It is also a troubling prospect that engaging in this debate breathes life in to a topic that should be left to smoulder and smother in the ruins of the ‘war on terror’.

This uneasiness is accompanied by a background anxiety about the impossibility of foreclosing arguments, thereby preventing them from being exploited by those ready for a ‘debate’, or worse, by those who advocate for torture. Rodley, in this regard, recognised the pitfalls in defining torture very narrowly or prescriptively, thus, playing in to the hands of states and torturers eager to evade the ban. ‘It is obvious’, he argued, ‘that a juridical definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition’.⁶ The euphemism of the Bush administration – ‘enhanced interrogation’ – and the ‘ingenuity’ of those who manipulated legal discussion of practices of torture, inhuman and degrading treatment, gave very concrete expression to Rodley’s concern.⁷

Shue provides an even more approximate expression of my own worry in the opening paragraph of his 1978 article *Torture*:

Whatever one may have to say about torture, there appear to be moral reasons for not saying it. Obviously, I am not persuaded by these reasons but they deserve some mention. Mostly they add up to a sort of Pandora’s box objection. If practically everyone is opposed to all torture, why bring it up, start people thinking about it, and risk weakening the inhibitions against what is clearly a terrible business.⁸

Shue was right to recognise that Pandora’s box was already open. In 2006, however, he redressed some of his own earlier arguments about interrogational torture in ‘rarefied situations’.⁹ He reaffirmed his position that ‘artificial cases make bad ethics’¹⁰ and emphasised that the ticking bomb scenario misleads through ‘idealisation and abstraction’.¹¹ The timing of his 2006 article no doubt reflected the fact that abstract musings on torture had proved attractive (his own and the abundant writing of others); advocates were relying all too heavily on the ticking bomb scenario, and, in his case, ignoring his clear direction that the hypothetical ‘assumed untenable circumstances and background conditions’.¹² It also seems likely, though, that he must have lamented how the residual ambiguity of his own examination of interrogational torture – his sense of ‘the permissibility of torture in a [ticking bomb scenario]

⁶ Nigel S. Rodley, *The Treatment of Prisoners under International Law* (2nd ed. Oxford University Press, 1999)

⁷ This is particularly the case as the Bush administration’s so-called ‘torture memos’, which gave birth to the enhanced interrogation programme, relied in part on an assessment which compared and contrasted its methods with the ‘five techniques’ that were central to the infamous 1978 European Court of Human Rights case of *Ireland v United Kingdom*. See, Jay S. Bybee, Memorandum for Alberto R. Gonzales, ‘Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 1 August 2002, cited in Karen J. Greenberg and Joshua L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2004) 172, 173, 196-198. Jeremy Waldron, Torture, Terror and Trade-Offs: Philosophy for the White House (Oxford University Press, 2010) 209-210; Michelle Farrell, ‘Transatlantic torture and the regrettable role of the European Court of Human Rights’ *The Liverpool View* (12 December 2014) available at <https://news.liverpool.ac.uk/2014/12/12/liverpool-view-transatlantic-torture-regrettable-role-european-court-human-rights/>.

⁸ Henry Shue, Torture, (1978) *Philosophy and Public Affairs* 124.

⁹ *Ibid* 143.

¹⁰ *Ibid* 141.

¹¹ Henry Shue, Torture in Dreamland: Disposing of the Ticking Bomb (2006) 37 *Case Western Reserve Journal of International Law* 231.

¹² Farrell (n 4 above) 106.

just like this' –¹³ has been interpreted and has fed in to debates since 1978.¹⁴ His two articles caution against discussing and debating torture in hypothetical scenarios as though those scenarios correlate with, or represent, the realities of the practice of torture.¹⁵

Torture was then, and is now, practised widely. It continues to be concealed and denied; in some cases, it is justified publicly with reference to necessity, ticking bombs or an equivalent defence. Whatever the academic value of debate, legal, moral or philosophical rubberstamping is a questionable response to the practice of torture; the provision of legal, ethical or philosophical firepower to states who need no help hypocritically upholding their normative commitment to the ban whilst denying or justifying their practice of torture may indeed be moral reason not to say 'whatever one may have to say about torture'.¹⁶ The lesson is to try to understand torture in practice, not to accept the justifications of states and perpetrators and not to engage in abstract hypothesising.

It is frustrating that so much attention is given to the category of so-called 'interrogational torture' and to the hypothetical scenarios that underpin this category. We remain far from understanding torture. In recent years, the field has been conditioned by the appeal of Hollywood, the heroic, life-saving, remorseful, good guy who had no choice but to strong arm the bad guy.¹⁷ Beyond the screen, and the ivory tower, the histories of torture are piled up, packed with reality. As Wolcher so neatly put it, the ticking bomb scenario 'threatens to lead us into a sort of bad infinity where we keep on overlooking instances of actual torture in order to take notice of the sort of 'torture' that only occurs inside works of fiction'.¹⁸

The waning of the post 11 September torture debate stymied, though certainly did not stop,¹⁹ the production of interventions on the ticking bomb scenario,²⁰ facilitating, perhaps, a turn to a

¹³ Shue (1978) (n 8 above) 141

¹⁴ Shue (2006) (n 11 above) 231.

¹⁵ Farrell (n 4 above) 24 citing Darius Rejali, *Torture and Democracy* (Princeton University Press, 2007) 547.

¹⁶ See n 8 above.

¹⁷ For a discussion of the representation of torture in the aftermath of 11 September 2001, see Derek Buescher, 'Exceptional Torture: Torture Imagery as Neocolonial Rhetoric' in Rae Lyn Schwartz-DuPré (ed), *Communicating Colonialism: Readings on Postcolonial Theory(s) and Communications* (Peter Lang, 2014) 128.

¹⁸ Louis E. Wolcher, 'Foreword' in Farrell (n 4 above) xi.

¹⁹ Proving the point that the ticking bomb torture debate is metastatic, the Human Rights Law Review has hosted a number of articles discussing the absolute nature of the prohibition against torture, precipitated by Greer's reading of the European Court of Human Rights case of *Gäfgen v Germany* as demonstrating the 'virtually' absolute nature of the prohibition, except in the 'rarest circumstances'. Steven Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gäfgen Case' (2011) 11 Human Rights Law Review 67; Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15 Human Rights Law Review 101. These articles have generated thoughtful responses. In particular, Mavronicola rebuts the fictive idea that there is a rights conflict, manifested, as Greer attempts to argue, in cases such as *Gäfgen*, where, he argues, a kidnap victim's rights should trump those of an unforthcoming suspect. Natasa Mavronicola, 'Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law: A Reply to Steven Greer' (2017) 17 Human Rights Law Review 479. See also, Natasa Mavronicola, 'Torture and Othering' in Benjamin J Goold and Liora Lazarus (eds.), *Security and Human Rights* (2nd ed. Hart Publishing, 2019) 27, 31 where she shows that Greer has 'miscast the issue and glossed over important aspects' in confusing the legal reality of rights in conflict. See also, Neil Graffin, '*Gäfgen v Germany*, the Use of Threats and the Punishment of those who Ill-treat during Police Interrogation: A Reply to Steven Greer' (2017) 17 Human Rights Law Review 681.

²⁰ It is difficult to gauge how the shift away from this particular debate impacts the practice of torture. The practice, to be clear, continues. It is certainly true, though, that the US practice and justification of torture and ill-treatment, as well as the ticking bomb rationale, have been used to licence or legitimate torture around the world. See UNHRC, 'Report of the Special Rapporteur, Manfred Novak' A/HRC/13/39/Add. 5, para. 44. It may also be the case that the turn of public attention away from torture impacts the scrutiny of extensive ongoing practices.

different kind of sustained and enlightening scholarly engagement with the study of torture.²¹ There are reasons to be cautious though in assessing the Bush administration era of torture. The ‘war on terror’ did not end, the truly responsible in the Bush administration have faced little sanction,²² and the torture debate was never really ‘won’ or put to bed. The Findings and Conclusions and Executive Summary of the Senate Intelligence Committee Report on Torture made an enormous splash when first published.²³ The product of around five years of work and of the analysis of ‘more than six million pages of CIA materials’, the declassified executive summary determined, amongst other damning findings:

- #1: The CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees;
- #2: The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness;
- #3: The interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others.²⁴

There has, however, been no real effort to prosecute those most responsible within the CIA for executing and delivering the enhanced interrogation programme or to seek out any mechanism of accountability.²⁵ Whilst criminal accountability was never really the objective of the Senate Select Intelligence Committee in pursuing its inquiry and in preparing the report, nothing significant has, to date, resulted from its publication.²⁶ The focus of the Committee on the CIA also allowed those responsible within the Bush administration to fly below the radar. Obama, who fought his first campaign on a decisively anti-torture stance, left office having never let go of his compulsion to move forward rather than spending time ‘laying blame for the past’.²⁷ Moreover, the report’s findings and the underpinning inquiry were, at any rate, deemed partisan, an exercise in cherry-picking.²⁸ Trump then entered office having fought a campaign promising to waterboard and worse,²⁹ fully convinced, despite everything, in his own ‘feelings’

²¹ There are already a few examples. For an excellent study of the collaboration between France and Argentina through French military ‘assistance’ in training torturers, see Melanie Collard, *Torture as State Crime: A Criminological Analysis of the Transnational Institutional Torturer* (Routledge, 2018). For an important study of the effectiveness of torture prevention, see Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press, 2016).

²² For an account of the construction of the legal advice that led to the use of torture in interrogation and for a discussion of the responsibility of the lawyers, see Phillippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008).

²³ Senate Select Committee on Intelligence, ‘The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program’ (Melville House, Brooklyn, London, 2014).

²⁴ *Ibid* 5.

²⁵ Stephen I. Vladeck, ‘The Torture Report and the Accountability Gap’ (2015) Summer/Fall Georgetown Journal of International Affairs 174.

²⁶ It could be argued that the appointment of Gina Haspel as CIA Director actually shows that the opposite is the case. See, Adam Serwer, ‘Obama’s legacy of impunity for torture’ *The Atlantic* (14 March 2018) <https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/>; Lisa Hajjar, ‘Why Gina Haspel, the Queen of Torture, was able to rise to the top of the CIA’ *The Nation* (16 March 2018) available at <https://www.thenation.com/article/why-gina-haspel-the-queen-of-torture-was-able-to-rise-to-the-top-of-the-cia/>.

²⁷ The White House, Office of the Press Secretary, ‘Statement of Barack Obama on Release of OLC Memos’ 16 April 2009.

²⁸ Mark Pythian, ‘An INS Special Forum: The US Senate Select Committee Report on the CIA’s Detention and Interrogation Program’ (2016) 31 *Intelligence and National Security* 8, 9.

²⁹ Mavronicola, ‘Torture and Othering’ (n 9 above) 32-33.

on the matter: ‘absolutely, I feel it works’.³⁰ His defence of torture sounded particularly preposterous. But the only real difference between Trump and his torture defending predecessors was in his more frank choice of words. Bush and his administration used euphemisms for torture and were less likely to parse their convictions in the indeterminacy of feelings: enhanced interrogation methods work...are necessary...have thwarted attacks or led to finding Osama Bin Laden...do not constitute torture; these were, and still are for many, the assertions of the Bush administration and CIA torture programme architects.³¹ As O’ Mara so aptly remarks, however, on this conviction around efficacy or necessity, Bush administration ‘policy seems to have been based on some combination of political preference and intuitive belief about human nature’.³² The mask slipped with Trump.

The ticking bomb scenario has, in all that time, been popularised and debated, in classrooms, newspapers and newsrooms, in tv shows and films and across the academy. It lies around like a torture device.³³ Moreover, the ticking bomb scenario continues to underpin, with Supreme Court approval, the policy of ‘special interrogation methods’ against Palestinians in Israel.³⁴

Despite the unease and the despair with this infatuation with the ticking bomb scenario, there is value in examining why the idea of torture as a method of interrogation is so prevalent and in understanding how and why so many have been so seduced by the ticking bomb scenario. The hypothetical also has some value when treated – merely – as the site from which to pursue an archaeology of torture – sifting through rhetoric, ideology and histories of torture can help us to understand the contemporary practice of torture.

This chapter shows how the ticking bomb hypothetical inhibits understanding of the practice of torture and how it operates to neutralise the ideology of torture. The acceptance of the ticking bomb discourse as a legitimate starting point, simultaneously and paradoxically, facilitates the practice – torture is greeted as exceptional rather than understood as a continuous practice of violence. By exposing the ideology, this chapter reveals the way in which the ticking bomb scenario serves as a proxy for domination and control, that is, for the erasure of ‘political subjectivity’,³⁵ and the creation of new political subjectivities, whether in ‘war on terror’, the Empire or in the metropole. Torture, I argue, is not about information and is not a method of interrogation. Torture is about the subjugation, pacification or correction of those constructed as not fully human, barbarians or sinners.

In this chapter, I will, first, critique how we talk about torture. I will argue that many of the most common ways in which torture and the ticking bomb scenario are discussed reinforce an ideology of torture. The discussion of torture’s efficacy, efforts to question the plausibility of

³⁰ Matthew Weaver and Spencer Ackerman, ‘Trump claims torture works but experts warn of its “potentially existential” costs’ *The Guardian* (26 January 2017) interview and analysis available at <https://www.theguardian.com/us-news/2017/jan/26/donald-trump-torture-absolutely-works-says-us-president-in-first-television-interview>.

³¹ See, for example, John Rizzo, *Company Man* (Scribe, 2014) 186, 233, 297-302; Jose A Rodriguez, *Hard Measures: How Aggressive C.I.A Actions after 9/11 Saved American Lives* (Threshold Editions, 2012) 66, 69; Donald Rumsfeld xii, 570-572, 582, 601-609.

³² Shane O’ Mara, *Why Torture Doesn’t Work: The Neuroscience of Interrogation* (Harvard University Press, 2015) 12.

³³ Wolcher (n 18 above) x.

³⁴ Smadar Ben-Natan, ‘Revise your Syllabi: Israeli Supreme Court Upholds Authorisation for Torture and Ill-Treatment (2019) 10 *Journal of International Humanitarian Legal Studies* 41.

³⁵ Marita Sturken, ‘Comfort, irony and trivialisation: The mediation of torture’ (2011) 14 *International Journal of Cultural Studies* 423, 424.

the ticking bomb scenario and examinations, through ethical argument, of torture in the ticking bomb scenario should all be treated with caution as these approaches inadvertently advance the ideology. Unpacking these overtures to the ticking bomb scenario is essential, first, for uncovering the ideology and, second, for reaching an understanding of torture as a civilising process.

Secondly, I critique the approach of categorising torture as interrogational. The tendency to discuss torture according to its purported purpose of obtaining information in interrogation manufactures an understanding of torture at serious odds with reality or history. This understanding of torture is, perhaps, inevitable, reified as it is by the definition of torture under international law where ‘torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes ... as obtaining ... information*’.³⁶ Whilst a *prohibited* purpose, this definition reinforces the idea that torture has such a purpose, that torture is a method of interrogation. Torture is not a ‘method of interrogation’; its aim is to destroy subjectivity. The words ‘purpose’ and ‘method’, however, condition a comprehension of torture as a means to an end (though most accept it to be a morally and legally prohibited means). That interrogation is merely the context for a form of violence, which aims at destroying subjectivity, is hard to grasp in the face of such rationalising language, law and learned intuition. Separating torture from interrogation in this way is a further essential step in reaching an understanding of torture as a civilising process.

Finally, I will show that the ticking bomb scenario is an imperial concept which remains, today, an instrument of the civilising mission. The ticking bomb scenario emerged out of a colonial context - expressly Algeria, although, equivalent constructions were used elsewhere.³⁷ It was a rationale that solved the equation between ‘their’ use of terrorism and ‘our’ use of torture (of course, the word torture is always avoided). The priority of thwarting terrorism provided a more palatable substitute to the reality of torture as an exercise of power to subdue the ‘savage’ for the preservation, and extension, of ‘our’ values, ‘our’ civilisation.³⁸ The ticking bomb scenario is the conceptual or political mechanism by which the colonised, the terrorist, or the deviant, more generally, can be excluded from the universal prohibition on torture.³⁹

1. Debating Torture

There are important points of departure to avoid – or, at a minimum, to take great care with – in the discussion of torture and the ticking bomb scenario.⁴⁰ These points of departure are: first,

³⁶ UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85, 113, Art 1(1) (emphasis added).

³⁷ The British government justified their brutality and the so-called five techniques in Northern Ireland on the grounds of saving the lives of civilians and members of the security forces: ‘information must be sought while it is still fresh so that it may be used as quickly as possible to effect the capture of persons, arms and explosives, and thereby save the lives of members of the security forces and of the civil population’. See, Her Majesty’s Stationery Office, ‘Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971’ (1971). In Kenya, where the British were responsible for widespread and systematic torture in the context of the Mau Mau rebellion, they used ‘euphemisms, technical jargon, and a sanitized vocabulary of abuse’. See Yolana Pringle, ‘Humanitarianism, Race and Denial: The International Committee of the Red Cross and Kenya’s Mau Mau Rebellion, 1952-60’ (2017) 84 History Workshop Journal 89, 97.

³⁸ See generally Rita Maran, *Torture: The Role of Ideology in the French Algerian War* (Praeger, 1989). For a concrete discussion of this point, see pages 81-84 and 95-97 in particular.

³⁹ Anthony Anghie, ‘The War on Terror and Iraq in Historical Perspective’ (2005) 43 Osgoode Hall Law Journal, 44, 52.

⁴⁰ Farrell (n 4 above) 14-17.

the question of torture's efficacy, second, the plausibility of the ticking bomb hypothetical, and, third, taking part in the debate by promoting a moral or ethical normative perspective in response to the ticking bomb scenario. Even the most rigorous and well-intentioned discussant seems unable to avoid the traps of this 'torture in the ticking bomb scenario' debate and, though they may not notice it or admit, they may find themselves reinforcing the torturer's justificatory perspective. These points of departure snare commentators in an escapist, circuitous, subservient debate that is entirely detached from the lived reality of torture. By examining how commentators have engaged in this debate, I illuminate just how this ticking bomb debate is rigged.

a. The efficacy debate

The efficacy of torture is a treacherous point of departure. The most watertight study will still be met with the incredulous, 'but what about x', or the dogged refrain, 'it might work in y'. As such, the debate is intractable. It also concedes too much. If torture is proved always inefficacious, then we can stop debating efficacy and concentrate on why it is practised, and we can criticise states for torturing 'superfluously'. The dark side of the coin, however, is in the submission, however unintentionally, first, to the idea that efficacy matters – that torture, argued to be efficacious, is up for debate, and, second, to the suggestion that states would not practise torture if they understood its inefficacy.

There may be exceptions in the literature to the otherwise seemingly unavoidable problem of reifying the efficacy of torture through debate. In *Why Torture Doesn't Work: The Neuroscience of Interrogation*, O' Mara provides a rigorous, meticulous and persuasive evidence-based argument demonstrating the inefficacy of torture. He also undertakes his study with integrity, grounding the examination in an attentive rebuttal of any case for the use of torture, whatever the science. His discussion of how the Bush administration torture policy architects 'consulted their consciousness' in defining and authorising torture and of their bad faith in picking and choosing the law and the science is scathing and grounds his thesis in an informed political context.

His central argument holds that torture has the completely contrary effect to the torturer's claim, to the folk- or common-sense myth and to that which is portrayed in fiction. Torture, 'a profound and extreme stressor that causes widespread and enduring alterations to the very fabric of the brain', inhibits memory.⁴¹ The stress and pain of torture – techniques such as those used by the Bush administration, including, sleep deprivation, drowning, environment and diet manipulation and physical violence – suppress cognitive ability: '...when one is experiencing threat, especially predator threat, which profoundly threatens one's bodily integrity and which is associated with pain, conscious regions are to a very large extent overridden'.⁴² O' Mara makes a plea for scientific, empirically grounded examination of the efficacy question, although he is wholly aware that the myth of efficacy is deeply embedded, intuitively and socially.

For many, the practice of torture is evidence of efficacy. Levinson maintained, at one point: 'If, after all, there were no genuine lure of the sirens, Ulysses would scarcely have needed to

⁴¹ O' Mara (n 32 above) 8.

⁴² *Ibid* 144. As well as this more general examination of the effect of stress and pain on the brain, O' Mara examines in detail the specific effects on the brain of sleep deprivation and of drowning, cooling, heating and starving the brain.

tie himself to the mast'.⁴³ In other words, the prohibition is needed because the practice exists and that practice shows torture's efficacy. As such, and because he explains and then destroys this kind of (il)logic – those 'insights' that are rooted in common-sense simplicity – O' Mara's book is an inestimable contribution.

O' Mara's argument and conclusions are, however, not without issue. Despite apprehending the political context, O' Mara leaves the, perhaps inadvertent, impression that a science or evidence-based understanding might prevent torture or have prevented the Bush policy, or that this evidence basis disproving efficacy could abolish the practice of torture. There are two important issues here. First, evidence matters, he says; in so doing, however, he also suggests that efficacy matters. It is not far-fetched to claim that a state, the US for example, acting in bad faith, wishing to torture, will find alternative evidence, a scientific study that yields to their needs. Indeed, the CIA has done it before.⁴⁴ Evidence is not infallible. Second, though, and more importantly, O' Mara takes the torturing state or the torturer at their word. The attention given to this purported purpose of extracting information maintains the transubstantiation of justification into fact or truth (albeit a fact/truth he sets out to disprove). By examining the use of torture for information – obtaining information being the only rationale or justification that contemporary states tend to provide when forced – O' Mara assumes that perpetrators torture in a *mistaken* belief in the reliability of torture. He gives too much credibility to, what Luban described fittingly as, the 'liberal ideology of torture':

The liberal ideology insists that the sole purpose of torture must be intelligence gathering to prevent the catastrophe; that torturing is the exception, not the rule so that it has nothing to do with state tyranny; that those who inflict the torture are motivated solely by the looming catastrophe, with no tincture of cruelty...⁴⁵

In order to really get to grips with torture, its history in various contexts and its future, it is, of course, important to destabilise the folk myth about efficacy and obtaining information because the ignorance can nourish the political context or environment in which torture is practised and feed the impunity of the perpetrators. But it is more important to redirect focus completely to why states practise torture. In order to understand why, it is essential to come to terms with the reality that claims about obtaining urgent information may disguise an individual's underlying motivations but, more importantly, such claims certainly conceal the underlying policy context,⁴⁶ and, crucially, ideology. Simply put, we cannot take states at their word; a deeply deconstructive, sceptical approach is warranted.

The treacherous question – 'does torture work?' – is a good starting point for a healthy dose of scepticism. It is rare for either the questioner or the respondent to define what they mean by 'works' and just as rare to see the question itself placed under scrutiny. There is merit in doing so. Agency - the perpetrator and the victim – is neutralised in the question – torture is doing

⁴³ Sanford Levinson, "'Precommitment' and 'Postcommitment': The Ban on Torture in the Wake of September 11" *Texas Law Review* (2003) 81 2013, 2030.

⁴⁴ Henry Shue. 'Book Review: Why Torture Doesn't Work: The Neuroscience of Interrogation: By Shane O' Mara' (2016) 37 *Political Psychology* 753, 756. See, in particular on this point, Naomi Klein, *The Shock Doctrine* (Penguin 2007) 25-46, describing CIA funding, and manipulation, of psychological research carried out at McGill University in the 50s. See also, generally, Alfred W. McCoy, *A Question of Torture: CIA Interrogation, From the Cold War to the War on Terror* (Metropolitan Books, 2006); Jennifer Harbury, *Truth, Torture and the American Way: The History and Consequences of US Involvement in Torture* (Beacon Press, 2005).

⁴⁵ David Luban, 'Liberalism, Torture and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1425, 1439.

⁴⁶ Herbert C. Kelman, 'The Policy Context of Torture: A Social-Psychological Analysis' (2005) 87 *International Review of the Red Cross* 123.

the torturing and the ‘working’. This is pure abstraction. But, more importantly, what is meant by the verb ‘work’ is generally left to the imagination. In Algeria, torture was geared at liquidating the leadership of the National Liberation Front (*Fronte de libération nationale* or FLN) and breaking the organisation completely.⁴⁷ Torture ‘worked’ because, by arresting and torturing thousands of people (many to death), the French shattered the resistance, terrorised and repressed the population - they broke their enemy.⁴⁸

Central to the question – does torture work – is, of course, the assumptions that the torture is ‘interrogational’ and applied for a worthy, or good, purpose as well as the presupposition of identification with whoever is doing the torturing. In this framing, intimidation and dominance over the suspect or victim are by-products of the urgency of obtaining the information, not central features of torture. The question is loaded and circuitous, and, it seems, it is perfect fodder for the fearful, the retributive, and the opinionated, roused by anecdote.⁴⁹

b. The plausibility of the ticking bomb scenario

As torture became a matter of public debate in the years following the attacks of 11 September, it became common for commentators to rest their arguments against the use of torture on the implausibility of that scenario ever materialising.

For example, in its guidance on the appropriate response to the ticking bomb scenario, the Swiss-based non-profit Association for the Prevention of Torture attempted to formulate a scheme for discrediting the scenario whilst reiterating the legal and ethical value of the torture prohibition.⁵⁰ The detailed response to the scenario, as the report explains, exposes the hidden assumptions of the ticking bomb scenario and debunks those assumptions. For the APT, the problematic assumptions included supposed certainty about: the existence of the attack and its imminence; having the right person in custody, with the information, only available through torture; and the existence of a torturer motivated only by stopping the attack, and only in this particular case.⁵¹ The report also warned of the risk of the descent down the slippery slope – allowing for torture in the exceptional case would open the floodgates to widespread and systematic torture.⁵² The APT aimed to equip the public, human rights advocates, academics and government officials with central arguments to rebut the ticking bomb exception to the prohibition. Their task, as for others in this debate, was Sisyphean. The ticking bomb hypothetical aims to elicit one’s intuition about the use of torture in an exceptional circumstance; in so doing, it constructs, or reinforces, a particular account or understanding of

⁴⁷ Martin Evans, *Algeria: France’s Undeclared War* (Oxford University Press, 2012) 206.

⁴⁸ By the end of the Battle of Algiers, 24,000 individuals had been arrested: most were tortured - 80% of the men + 66% of the women; 3,024 were disappeared, following summary execution or death in interrogation. Raphaëlle Branche, *La torture et l’armée pendant la guerre d’Algérie* (Paris: Gallimard, 2001), cited in Rejali, *Torture and Democracy* (n 15 above) 482. See also, generally, Raphaëlle Branche, ‘Torture of Terrorists? Use of Torture in a “War Against Terrorism”: Justification, Methods and Effects: the Case of France in Algeria, 1954–1962’ (2007) 89 *International Review of the Red Cross* 543.

⁴⁹ O’ Mara (n 32 above) 2-3. O’ Mara makes a couple of neat assertions that have inspired my point here. He remarks, ‘...the protorture and procoercian case is almost always made with an ad hoc mixture of anecdote, cherry-picked stories, and entirely counterfactual stories that the authors usually find convincing – like the ticking bomb scenario’. He also says, correctly, ‘...it also seems to me, having read many of these protorture cases, that at least some authors are motivated by a barely uttered desire to engage in torture...for retributive or punitive reasons’.

⁵⁰ Association for the Prevention of Torture, ‘Defusing the Ticking Bomb Scenario: Why We Must Say No To Torture, Always’ (Geneva: Association for the Prevention of Torture, 2007).

⁵¹ *Ibid* 4-11.

⁵² *Ibid* 13-14.

torture. Rebutting the hypothetical without challenging this learned and constructed understanding of torture misses the very deception of the hypothetical – the hypothetical renders reality in a way that edits out apprehension or understanding of torture.⁵³

In his 2006 essay, Shue argued that imaginary examples like the ticking bomb hypothetical are misleading because they both idealise and abstract: ‘Idealisation adds sparkle, abstraction removes dirt.’⁵⁴ So, for Shue, the ticking bomb scenario idealises by adding positive features that make them more concrete than is likely under real circumstances: ‘The right man’ *is* in custody and he *will* promptly and accurately disclose information under torture. And torture will *only* be used in this ‘rare, isolated case’.⁵⁵ The ticking bomb scenario abstracts from reality by removing negative features: the hypothetical erases the reality that torture requires institutional competence – proper administration, thus, trained torturers.⁵⁶ We know, though, that Shue is unable to disregard fully catastrophic logic, and, as such, he winds up reproducing the state’s excuse: ‘If the perfect time for torture comes, and we are not prepared to prevent a terroristic catastrophe, we will at least know that we have not sold our souls and we have not brutalized the civilization.’⁵⁷

According to Brecher, ‘to use a hypothetical example as though it were a real case without first considering very carefully its plausibility in the real world is intellectually and politically irresponsible’.⁵⁸ Brecher echoes Scheppele who dismissed the hypothetical as “irresponsible” because of its presentation of the ‘purity of the extreme’.⁵⁹ Like Scheppele, Brecher set about undermining the scenario with the goal of showing it to be a fantasy and, thus, no basis for public policy. Brecher focused his attention on the problems with the internal logic of the scenario by querying assumptions around capacity to torture, its effectiveness, within the necessary time, perpetrated on the person who knows, in a situation of necessity. Like so many others, Brecher is also wary of the ‘slippery slope’, allowing torture in the ticking bomb scenario would ‘lead to its spread’, ‘normalizing the practice’.⁶⁰ Brecher is not just concerned with the ticking bomb scenario. He goes deeper to recognise that ‘interrogational torture’ itself – that is, torture as a method applied to obtain information in interrogation - is a fantasy and that torture is inherently wrong. Brecher is particularly self-conscious, attentive to the intellectual poverty of the approach that he has had to take by engaging in such an engrossed deconstruction of ticking bomb logic: ‘My excuse...and I hope a justification, is that I had to get my hands intellectually dirty if I was to offer arguments that stood a chance of being listened to’, he remarks.⁶¹ Brecher, like O’ Mara, is persuasive but the examination has limits. He closes off so many of the arguments of the apologists and demonstrates the moral bankruptcy at the heart of the ticking bomb debate. However, he is unable to fully avoid the traps of the scenario and, like Shue, he reproduces the logic of the state – that the use of torture could avoid the

⁵³ Farrell (n 4 above) 25; Mathias Thaler, *Naming Violence: A Critical Theory of Genocide, Torture, and Terrorism* (Columbia University Press, 2018) 105.

⁵⁴ Shue (2006) (n 11 above) 231.

⁵⁵ *Ibid* 233.

⁵⁶ *Ibid* 237.

⁵⁷ *Ibid* 239.

⁵⁸ Bob Brecher, *Torture and the Ticking Bomb* (Blackwell Publishing, 2007) 9.

⁵⁹ Kim Lane Scheppele, ‘Hypothetical Torture in the War on Terrorism’ (2005) 1 *Journal of National Security Law and Policy* 285. Scheppele mounts a sociological attack on the gap between the hypothetical and real-life and cautions against consequentialist analyses of the ticking bomb scenario.

⁶⁰ Brecher (n 58 above) 75.

⁶¹ *Ibid* 88.

catastrophe: ‘The very occasional catastrophe’, he writes, ‘is the price we have to pay to avoid creating a torturous society’.⁶²

Debating the plausibility of the materialisation of a ticking bomb scenario, in these ways, is – like efficacy – treacherous. Arguments advocating a moral standpoint do not stand a chance in a debate characterised by moral contestation, submerged in ideology. Implausibility arguments, moreover, are a gift to those imaginative or ill-intentioned enough to mould what they think is the ever more conceivable or realisable scenario. To those who are primed to think with the ticking bomb, ticking bombs become omnipresent – kidnapping cases, hostage scenarios all earn ticking bomb logic.

Some commentators have recognised, and taken seriously, the treachery of the ticking bomb scenario.⁶³ For Luban, the ticking bomb ‘cheats its way around ... [the] difficulties by stipulating that the bomb is there, ticking away, and that officials know it and know they have the man who planted it’.⁶⁴ These exact circumstances will, he argues, seldom be met. Whilst even opening this ‘seldom’ space risks concession, Luban’s uneasiness with the ticking bomb scenario goes, at any rate, far beyond it having these obvious deceptions and impracticalities. Luban dismisses the ticking bomb scenario as intellectual fraud and because he views it as signposting a liberal ideology of torture whilst ignoring the actual practice of torture:⁶⁵ ‘any responsible discussion of torture must address the practice of torture, not the ticking-bomb hypothetical’, he maintains.⁶⁶ It is on Bush administration policy and practices, and not the ticking bomb scenario, that his analysis concludes. It is crucial to resist engaging in the ticking bomb discussion because, as I will now show, the ticking bomb scenario operates to neutralise an ideology of torture.

i. Shaping reality: the ticking bomb as ideology

First, approaching the hypothetical as mere fantasy, or as a thought-experiment that can be dismantled conclusively, leaves the impression that the root of this discussion or issue is practical – *but those exact circumstances could never happen in that way!* – rather than ideological. The ticking bomb scenario and the understanding of torture it creates is an ideological construct precisely because it is a concept which shapes reality – that is, which shapes a reality of torture.

The meaning of ideology is not easily rendered. It has a complex history,⁶⁷ and multiple meanings,⁶⁸ but the concept is constructive. In general terms, and in Freedman’s words, ideology can be understood as a ‘specific way of interpreting and decoding political reality, to construing political practices as expressions of, and constitutive of, political ideas, with the ultimate goal

⁶² *Ibid* 88.

⁶³ See, for example, Elaine Scarry, ‘Five Errors in the Reasoning of Alan Dershowitz’ in Sanford Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004) 281. Understandably, like Brecher, Scarry did find it necessary to counteract the arguments advocating torture in ticking bomb situations because they had become so common not just in academic writing but also in policy-making.

⁶⁴ Luban (n 45 above) 1442.

⁶⁵ *Ibid* 1439. Farrell (n 4 above) 130.

⁶⁶ Luban (n 45 above) 1445.

⁶⁷ John B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Polity Press, 1990) 29.

⁶⁸ Terry Eagleton, *Ideology: An Introduction* (Verso, 1991, 2007 edn) 1-2.

of formulating a legitimated public policy'.⁶⁹ Freedden's account of ideology implies neither a negative or positive reading. It is, for him, an important way of understanding the political tradition at work.⁷⁰ But even this quite neutral definition of ideology can help to understand how the act of torture, often spoken of as beyond the Pale, as medieval, as dictatorial or tyrannical, indeed, as evil, can, using the ideological construct of the ticking bomb scenario, be translated in to, or construed as, something necessary, acceptable and legitimate, and, thus, made policy.

A more critical or analytical examination of the ideology of the ticking bomb scenario is revealing of the myriad ways in which this ideology is sustained through its discussion and deconstruction as well as through its deployment in a policy context. To sharpen the examination, a critical, penetrative understanding of ideology is needed. Thompson, informed primarily by Marx' use of the term, says, 'to study ideology is to study the ways in which meaning serves to establish and sustain relations of domination'.⁷¹ Marks, drawing on Thompson, understands ideology as 'the mystifications through which ideas help to establish and maintain' domination in asymmetrical power relations.⁷² Marks isolates insightfully the distinction between being ideological and perpetuating ideology through one's actions, however unintentionally. This insight is crucial in helping to explain how the ticking bomb discussion is handled, by voices on all sides and why this discussion is part of the problem. She remarks:

...the mystification lies not in unawareness of social reality, but in unawareness of, or at any rate inattention to, the extent to which actions and words, and the ideas expressed through them, serve to shape social reality...the mystification lies in a failure adequately to consider the *reflexivity* of social life---the way social practices are continually re-examined and reformed *in the light of what is said about them*.⁷³

The ideology at stake in the ticking bomb debate starts to crystallise under this observation. Ideology is not only (or even importantly) about what you or I, Shue or Brecher think of the practice of torture or of the ticking bomb scenario. The ideology is contained within the scenario itself and in the conception of torture that it provokes. It is no good being against torture, *even* in the catastrophic case, or being sceptical of the catastrophic case itself, whilst engaging it, arguing its merits, pros and cons, because this engagement and argument perpetuates an ideology of torture. Eagleton provides the elegant framework for this understanding. He says:

Ideology...[is] not just a matter of what I think about a situation. It is somehow inscribed in the situation itself. It is no good my reminding myself that I am opposed to racism as I sit down on a park bench marked 'Whites Only': by the action of sitting on it, I have supported and perpetuated racist ideology. The ideology, so to speak, is in the bench, not in my head.⁷⁴

⁶⁹ Michael Freedden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford University Press, 1996) 553.

⁷⁰ Susan Marks, 'Big Brother is Bleeping Us – With the Message that Ideology Doesn't Matter' (2001) 12 *European Journal of International Law* 109, 111.

⁷¹ Thompson (n 67 above) 56.

⁷² Marks (n 70 above) 109 and 111.

⁷³ *Ibid* 113 (emphasis added).

⁷⁴ *Ibid* citing Eagleton (n 68 above) 40.

It is not easy to explain the practice of torture. However, by investigating and exposing the ideological architecture of the ticking bomb construct, it is possible to reach an authoritative comprehension of torture on terms that simultaneously eschew and explain those that have been set by the state. In this respect, Luban and Rejali are very useful to my excavation of the ideology of the ticking bomb scenario and to my illumination of the ticking bomb scenario as imperial ideology.

Luban examines torture's complicated relationship with liberalism as embodied in the ticking bomb scenario. He views the ticking bomb scenario as rhetorically valuable, first, as a mechanism to unravel the prohibitionist's absolute moral stance against torture: 'Dialectically, getting the prohibitionist to address the ticking bomb is like getting the vegetarian to eat just one little oyster because it has no nervous system. Once she does that – gotcha!' ⁷⁵ He disregards this kind of utilitarian or cost-benefit approach as a way of thinking about torture. ⁷⁶ Second, he views it as a mechanism for placating liberal aversion to cruelty by portraying the torturer 'in a different light': 'The torturer is...a conscientious public servant, heroic..., willing to do desperate things only because the plight is so desperate and so many innocent lives are weighing on the public servant's conscience. The time bomb clinches the great divorce between torture and cruelty'. ⁷⁷ The ticking bomb scenario, for Luban, is principally a way of making a barbarous practice liberally palatable. Luban is reluctant to get in the mechanics of the ticking bomb scenarios.

Rejali opens up the space to consider the complex gender norms that underpin torture and the ticking bomb scenario. Drawing particularly on the Algerian context, on Fanon, Sartre, and Lartéguy's novel *Les Centurions*, he situates the ticking bomb scenario within the context of hegemonic gender norms, ⁷⁸ fears of fading masculinity, and of democracy corrupting masculinity. 'Torture generates a kind of manly strength' for those who 'worry that we have become sissies and our enemies know it'. ⁷⁹ The ticking bomb scenario, he observes, provokes 'a long-felt, common anxiety that democracy has made us weak and there are no real men anymore'. ⁸⁰ Torture is employed then in defence of civilisation, a civilisation that, to defeat its enemies, must 'man-up'. His analysis augments an understanding of torture that is otherwise stunted by the ticking bomb framing. His point is not to simplify or caricature torture perpetrators as male (though the ticking bomb hypothetical does invite a gendered reading). Rather, Rejali found that 'manhood and democracy' were 'very much at issue in discussions of torture during the Algerian War', where ticking bomb logic was pervasive, and he finds these same discussions underpinning the rise of the ticking bomb and the use of torture in the post 11 September United States context. Rejali taps in to important gendered configurations which structure social practice and, as such, his work invites a deeper reading of torture.

The state is a masculine institution. ⁸¹ The US military is 'a masculinist and heterosexist environment'. ⁸² Crucially, in this setting, gender and race interlock: the reclamation or defence of masculinity, observable in the aftermath of 11 September, meshed with 'white fears' of the

⁷⁵ Luban (n 45 above) 1427.

⁷⁶ David Luban and MJ Engel, 'Intersections of Torture and Power: An Interview with David Luban' (2014) 15 *Georgetown Journal of International Affairs* 110.

⁷⁷ Luban (n 45 above) 1441.

⁷⁸ In particular, Rejali highlights 'hegemonic masculinity' whereby a particular masculinity dominates. See R. W. Connell, *Masculinities* (2nd ed. Polity, 2005) 77.

⁷⁹ Darius Rejali, 'Torture makes the man' (2007) 24 *South Central Review* 151, 151 and 169.

⁸⁰ Rejali, *Torture and Democracy* (n 15 above) 548.

⁸¹ R. W. Connell, *Masculinities* (2nd ed. Polity, 2005) 75.

⁸² Ryan Ashley Caldwell, *Fallgirls: Gender and the Framing of Torture at Abu Ghraib* (Ashgate, 2012) 44.

violence of the racialised other.⁸³ The torture memos, and the masculinist ideology that inspired them,⁸⁴ could take root easily in such a fertile environment. Torture is ‘not a simple dyadic relationship’ as the ticking bomb scenario would have it; rather torture occurs in complex organisational contexts that are intersected by constructions of masculinity, gender and race.⁸⁵ Hyper ‘masculine socialisation’ is at play in armed conflict and counterinsurgency.⁸⁶ The interaction of gender, race and class in armed conflict and in imperial and counterinsurgency contexts is essential to understanding torture.⁸⁷

This interaction was represented in the Abu Ghraib photographs and the scandal of, as Khalili puts it, the ‘transgressive women’ torturers.⁸⁸ The mainstream and media monsterring of the female soldiers at Abu Ghraib ‘trafficked in gendered stereotypes’.⁸⁹ In so doing, they missed how gender roles were being performed, in what Kaufman-Osborn has called a ‘logic of emasculation’: the aim of the disciplinary techniques was ‘to strip prisoners of their masculine gender identity and turn them into caricatures of terrified and often infantilized femininity’.⁹⁰ The emasculating and homoerotic approach to torture at Abu Ghraib⁹¹ was underpinned by racism at the highest levels, where the intentional exploitation of ‘the Arab mind’ was part of the enhanced interrogation narrative.⁹² The prominence of sexual violence and sexual humiliation at Abu Ghraib reflected the long-standing Orientalist interpretation of the Muslim or Arab world as sexually repressed and homophobic. Torture at Abu Ghraib aimed at exploiting this construction of the victims, but this torture was played out through ‘a cultural code of masculinity’,⁹³ where, as Caldwell shows, power and control were exerted over the male body,⁹⁴ and their feminization through torture and sexual humiliation served ‘to humiliate and mock cultural constructions of masculinity itself’.⁹⁵ Torture enacted a kind of liberation of the repressed Muslim or Arab victim whilst simultaneously enacting the United States ‘as a place free of such sexual constraints’.⁹⁶ The misogyny, homophobia, and racism that drove the torture at Abu Ghraib are hard to miss.

Yet, Abu Ghraib has been read as an unfortunate exception and as chaotic, the result of the deviance of a few bad apples.⁹⁷ The ticking bomb scenario is positioned in contrast to Abu

⁸³ Paul Hoch cited in Connell (n 81 above) 75.

⁸⁴ See, for example, Seymour M Hersh, ‘The Gray Zone: How a Secret Pentagon Program came to Abu Ghraib’ *The New Yorker* (16 May 2014) discussing the neo-con view of Iraq, Arabs and violence in the lead up to the invasion.

⁸⁵ Rejali, ‘Torture makes the man’ (n 79 above) 163.

⁸⁶ Eileen L. Zurbriggen, ‘Sexualised torture and abuse at Abu Ghraib prison: Feminist Psychological Analysis’ (2008) 18 *Feminism and Psychology* 301.

⁸⁷ Laleh Khalili, ‘Gendered Practices of Counterinsurgency’ (2011) 37 *Review of International Studies* 1471, 1482.

⁸⁸ *Ibid.*

⁸⁹ Timothy Kaufman-Osborn, ‘Gender Trouble at Abu Ghraib?’ (2005) 1 *Politics & Gender* 597, 605.

⁹⁰ *Ibid* 606.

⁹¹ Ryan Ashley Caldwell, *Fallgirls: Gender and the Framing of Torture at Abu Ghraib* (Ashgate, 2012) 66.

⁹² Hersh (n 84 above) cited and discussed in Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2017) 83-84.

⁹³ Caldwell (n 91 above) 47.

⁹⁴ The photos and the publicity around Abu Ghraib have mainly concerned male victims. Women were tortured and women were raped, though this has been vastly underreported. See, Puar (n 92 above) 98; see also, Luke Harding, ‘The Other Prisoners’ *The Guardian* (20 May 2004).

⁹⁵ Caldwell (n 91 above) 16.

⁹⁶ Puar (n 92 above) 92.

⁹⁷ Caldwell (n 91 above) 1, 44. Rumsfeld says of Abu Ghraib: ‘These acts could not conceivably have been authorised by anyone in the chain of command, nor could they have been any part of an intelligence-gathering or

Ghraib: it is the necessary exception to an otherwise commendable rule; in the ticking bomb scenario, only what is necessary is done, mechanistically, by a cool, poised, and professional public official. In reality, however, the ticking bomb hypothetical and torture at Abu Ghraib are manifestations of the same ideological codes of masculinity. Moreover, torture at Abu Ghraib was the product of the ticking bomb exception. That 'exception' was negotiated by the Bush administration, and was operationalised by the CIA and by the United States military, including at Abu Ghraib.

For his part, in coming to terms with the ideology of the ticking bomb scenario, Hannah has drawn out the symbiosis between torture and terrorism as characterised by the hypothetical. He argues that the ticking bomb scenario is used to represent the geographical extent of, and the unacceptably severe extent of, the threat posed by terrorism. Widespread, imminent terrorism makes torture seem like a reasonable response: 'the ticking-bomb scenario prompts a reimagining of the landscape of everyday life as suffused with an unacceptably high level of risk.'⁹⁸ But Hannah fails to fully grasp the ideology of the construct. Where Hannah could have developed his analysis to show how the ticking bomb scenario is characterised by fear tactics, he falls back in to the troubling investigation of the motives of perpetrators and, ultimately, he gives the scenario 'an objective value...he disbands responsibility by presenting the ticking bomb scenario back to the authorities as justification for its actions'.⁹⁹ He remarks, rather trustingly: 'High officials in the Bush administration appear not only to have taken the premises of the ticking-bomb scenario seriously but also to have drawn the same permissive conclusions regarding torture as have many ethicists'.¹⁰⁰ It is important to grasp the significance of this. Being awake to the ideology of the ticking bomb scenario reduces the likelihood of slipping into a narrative that winds up accepting the state's rationalisation.

Whilst there have then been many well-argued efforts to diffuse,¹⁰¹ dispose of,¹⁰² and otherwise dismiss the ticking bomb, such dismantling will only convince those who had not really thought about the impracticalities. Even the most benevolent and well-prepared disputant can fall into traps when arguing against the ticking bomb scenario on the basis of implausibility. Exposing the fallacies of the scenario is unlikely to eliminate its appeal either to those convinced by the rare case, or to those who are ideologically committed – consciously or unconsciously – to torturing enemies and who have internalised the ticking bomb as their rationale. As well as perpetuating a particular ideology of torture, it is also the case, at times, that the exclamation that such a scenario would never arise can imply that plausibility is the problem rather than torture. In order, then, to understand torture, it is necessary to investigate the ideology that founds the ticking bomb scenario to show the ideologically constructed connection between torture and interrogation and torture and information.

ii. Shaping torture: the ticking bomb and the purpose of interrogation

The second reason to resist debating the plausibility of a ticking bomb scenario is deeply related to this failure to recognise ideology at work. Debating plausibility may, and, more often than

interrogation effort. Rather, they were the senseless crimes of a small group of prison guards who ran amok in the absence of adequate supervision'. Donald Rumsfeld, *Known and Unknown: A Memoir* (Sentinel, 2012) 545.

⁹⁸ Matthew Hannah, 'Torture and the Ticking Bomb: the War on Terrorism as a Geographical Imagination of Power/Knowledge' (2006) 96 *Annals of the Association of American Geographers* 622, 623.

⁹⁹ Farrell (n 4 above) 132-133.

¹⁰⁰ Hannah (n 98 above) 624.

¹⁰¹ Association for the Prevention of Torture (n 50 above).

¹⁰² Shue (2006) (n 11 above).

not, in my reading, does, signal acceptance of the premise that torture *is* a purposeful method of interrogation. By way of illustration, many commentators raise a point about competence through the question, ‘who will torture?’¹⁰³ Brecher, in asking this question, makes a significant point:

The first reason why the ticking bomb scenario remains a fantasy, and not a description of a rare but realistic possibility, is that it fails to distinguish between what you or I *might* do in that imagined case and what you or I *could* do in an actual case. It fails to distinguish between individuals’ possible visceral response and any proper basis of public policy.¹⁰⁴

This is significant because the ticking bomb scenario is a poor thought experiment.¹⁰⁵ It aims to elicit an intuitive response to whether torture is necessary, to whether ‘you’ would torture;¹⁰⁶ the layperson debating this scenario is, however, incompetent to answer. As such, the ticking bomb scenario is presented to persuade the listener rather than to get them thinking.

However, and more importantly, raising the issue of incompetence is not an ethical strategy of dismissal. Consider Shue’s incompetence-based rebuttal: ‘...it is simply dreamy to think that all of a sudden we are simply going to stumble upon someone who happens to have the skills to make a man who planted a ticking bomb reverse the direction of his life and assist us in defusing his bomb.’¹⁰⁷ The abstraction here is quite startling. Arguing against the plausibility of the ticking bomb scenario on the basis that only trained torturers could torture concretises the idea of a profession of *interrogational* torture and simultaneously imagines away the reality that torturers do exist, fully trained and otherwise. Dreaming up a torturer-free world of deficient proficiency as an argument to counteract the ticking bomb scenario is, at best, misrepresentative, at worst, perverse.

Ginbar undertakes a similarly problematic discussion¹⁰⁸ of the ‘institutionalisation trap’, as part of his more general examination of the slippery slope and other dangers of states resorting to torture in ticking bomb situations.¹⁰⁹ Apparently to demonstrate the bureaucratisation that would be required in a world where torture would be lawful or permissible – and seemingly effective or successful – in ticking bomb scenarios, Ginbar depicts institutionalisation in great detail:

I would therefore submit that, in a state facing terrorism, the pro-torture reasoning inevitably calls for sending in professionals: for example, martial arts experts (perhaps

¹⁰³ Brecher (n 58 above) 21. See also, Shue (2006) (n 11 above) 236-7.

¹⁰⁴ Brecher (n 58 above) 22.

¹⁰⁵ For a useful discussion of thought experiments in political theory, an argument in favour of distinguishing between relevant and irrelevant hypotheticals and a careful consideration of the ticking bomb thought experiment, see Mathias Thaler, ‘Unhinged Frames: Assessing Thought Experiments in Normative Political Theory’ (2018) 48 *British Journal of Political Science* 1119.

¹⁰⁶ Farrell (n 4 above) 8.

¹⁰⁷ Shue may make this point somewhat tongue in cheek – at any rate, by ‘assist us in defusing his bomb’ he almost certainly means ‘assist us in providing information’. Shue (2006) (n 11 above) 237.

¹⁰⁸ Ginbar’s examination of torture is thorough insofar as he does not examine the ticking bomb scenario in the abstract *only*. He examines the practice of a number of states where the ticking bomb scenario has been used. He is convinced by some state justifications for using the ticking bomb scenario: ‘Neither Israel nor the USA have succeeded in limiting torture to ticking bomb situations...Both states claim, probably rightly in some specific cases, that torturing (not so named) has thwarted terrorist attacks and saved lives...’ But he is critical of the way in which that scenario has been used to justify expansive use of torture and he favours overall the absolute prohibition against torture. Ginbar (n 3 above) 264.

¹⁰⁹ Ginbar (n 3 above) 112, 133-34.

assisted by neurologists) would teach interrogators where and how to hit a detainee in order to achieve the desired effect. And for such interrogations to be truly efficient, other physicians must be attached to our crack interrogation unit, as people are not physiologically uniform, and minute-by-minute monitoring is required, to ensure that the right (or exact) amount of pain is administered. Similarly, psychologists or psychiatrists must be on the scene, to advise interrogators as to the methods that would be most efficient against the particular individual, and monitor the effect of the methods used on the terrorist's willpower, endurance and sanity. Where the use of methods...such as rape, electric shocks, and so on, is deemed unavoidable, properly trained and equipped staff should similarly be available. The same is true...of methods such as loud music, white noise, extreme heat and cold—and even 'stress positions' and sleep deprivation.¹¹⁰

It may seem surprising that the quoted passage was written as part of Ginbar's defence of a minimal absolutist prohibition against torture. In constructing that position, Ginbar may have felt it necessary to paint for his readers, and the pro-torture commentators, just what it is that they are supporting when they advocate for the use of torture in catastrophic cases. In so doing, however, he concretises the idea that torture is for the purpose of retrieving information, that it requires a professional skill set.

There should be an adage in these debates about straying on to the 'slippery slopes' and winding up as the torturer's accomplice. The ticking bomb scenario in these debates is a thought experiment, a hypothetical, but torture is not. Torture is practised and there are torturers. Beyond the debates, the ticking bomb scenario is, therefore, more than a thought experiment. It is an ideology that is invoked by states to justify practices and policies of torture.¹¹¹

iii. Shaping justification: the ticking bomb, policy and the state

Finally, then, and intimately connected to the previous point, dismissing the ticking bomb scenario as implausible ignores the extent to which it is the touchstone in practice for states and perpetrators to justify their use of torture. In the sense that states do employ ticking bomb justifications, there is something very real about the scenario.

States may invoke the ticking bomb scenario directly, as the Landau Commission of Inquiry famously did in Israel in 1987.¹¹² Ticking bomb logic underpinned the Landau Commission's decision, as part of that inquiry, to authorise the General Security Services to use 'moderate physical pressure' during the interrogation of Palestinians suspected of engagement in acts of terrorism.¹¹³ The ticking bomb continues to provide the basis for the application of the necessity defense, following the use of torture (or supposed 'special interrogation methods') in Israeli Security Agency interrogations.¹¹⁴ For its part, the Bush administration did not directly quote the kind of catastrophic case imagined in the ticking bomb scenario but it did couch its policy in the impending threat of terrorism, in an environment in which the ticking bomb was

¹¹⁰ Ginbar (n 3 above) 134.

¹¹¹ Farrell (n 4 above) 8. Hannah (n 98 above) 623.

¹¹² 'Excerpts of the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity' (1989) 23 Israel Law Review 146.

¹¹³ Farrell (n 4 above) 109.

¹¹⁴ Elena Chakho, 'Tabish v. Attorney General and the Legal Framework Governing Physical Coercion in ISA Interrogations' Lawfare (6 December 2018) available at <https://www.lawfareblog.com/tabish-v-attorney-general-and-legal-framework-governing-physical-coercion-isa-interrogations>.

omnipresent. The ticking bomb scenario supplied ‘the imagery’ for Bush and his administration.¹¹⁵ Bybee’s infamous 2002 memo reflects the imagery: ‘If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network’.¹¹⁶ The doctrine of necessity, according to the memo, allowed supersession of the prohibition on torture.¹¹⁷

The practice in Israel provides a striking contemporary illustration of the use of the ticking bomb scenario both as a blanket justification for the practice of torture and as a backstop for political or legal scrutiny of that use of torture.¹¹⁸ The Landau Commission authorised the use of ‘moderate physical pressure’ in interrogations, in their reasoning, to prevent impending acts of terrorism. The Commission opined that the use of ‘moderate physical pressure’ would be justified, *ex ante*, under the necessity defence, for the purpose of obtaining any information that could contribute to foiling potential acts of terrorism:

...the information which an interrogator can obtain from the suspect, about caches of explosive materials in the possession or the knowledge of the suspect, about acts of terrorism which are about to be perpetrated, about the members of a terrorist group to which he belongs, about the headquarters of terrorist organizations inside the country or abroad, and about terrorist training camps – any such information can prevent mass killing and individual terrorist acts which are about to be carried out.¹¹⁹

The Commission explained what it meant by a ticking bomb situation: ‘And indeed, when the clock wired to the explosive charge is already ticking, what difference does it make, in terms of the necessity to act, whether the charge is certain to be detonated in five minutes or in five days?’¹²⁰ As such, the Landau Commission reasoned that physical pressure could escalate in time with the detonator – but the act itself rather than danger or time was the important point of imminence.

This authorisation of the use of ‘moderate physical pressure’ was the subject of a famous decision before the Israeli Supreme Court, sitting as the High Court of Justice, in 1999. In that decision, the Court determined that methods employed by the General Security Services surpassed the requirements of a reasonable investigation and that the general advance authorisation of techniques of interrogation, so called ‘moderate physical pressure’, under the necessity defence was incompatible with Israeli law.¹²¹ However, the Court also allowed that the necessity defense, which precludes criminal liability, might be available to an interrogator

¹¹⁵ Hannah (n 98 above) 624.

¹¹⁶ Jay S. Bybee, Memorandum for Alberto R. Gonzales, ‘Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, 1 August 2002, cited in Greenberg and Dratel (n 7 above) 213.

¹¹⁷ Michael P. Scharf and Paul R. Williams, *Shaping Foreign Policy in Times of Crisis* (Cambridge University Press, 2010) 188.

¹¹⁸ For a discussion (that reads as quite cavalier given the subject matter) of the ticking bomb scenario in national news, see Yonah Jeremy Bob, ‘Shin Bet enhanced interrogations to stop ticking bombs – legal or torture?’ *The Jerusalem Post* (21 October 2017) available at <https://www.jpost.com/International/Ticking-bomb-507917>. For his discussion of the outcome of that case, see Yonah Jeremy Bob, ‘High Court: enhanced interrogations was legal to ‘ticking bomb’’ *The Jerusalem Post* (20 June 2018) available at <https://www.jpost.com/Israel-News/High-Court-Enhanced-interrogation-was-legal-to-stop-ticking-bomb-517905>.

¹¹⁹ ‘Excerpts’ (n 112 above) 172.

¹²⁰ *Ibid* 174.

¹²¹ *The Public Committee against Torture in Israel et al. v. Government of Israel et al.*, HCJ 5100/94 (6 September 1999) paras. 32, 33, 35.

ex post facto in ‘appropriate circumstances’ of immediate need, as provided for in Israeli penal law:

...we are prepared to accept...that the “necessity defense” can arise in instances of ‘ticking bombs,’ and that the phrase ‘immediate need’ in the statute refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization.¹²²

The Court left it to the Attorney General to determine the fallout of this ambiguous reasoning.¹²³ The Attorney General reacted by issuing a document outlining the guidelines according to which he would instruct himself in such cases – the so-called internal guidelines.¹²⁴ Rather than outlawing torture, this decision simply reoriented the way in which torture was managed. As Mann has written, the decision, whilst lauded for its rejection of torture and defence of human dignity, entrenched abusive interrogation methods.¹²⁵

Ticking bomb logic continues to underpin the Israeli security forces’ use of torture.¹²⁶ That logic has been endorsed in two recent high-profile cases before the Supreme Court, sitting as the High Court of Justice.¹²⁷ Most recently, the Court, in *Tbeish*,¹²⁸ dismissed the applicant’s challenge to the lawfulness of the Israel Security Service (ISA) internal guidelines on special interrogation methods. The applicant also challenged the Attorney General’s failure to order a criminal investigation into his allegations of torture in interrogation. The security services had applied so-called ‘special interrogation techniques’ to the applicant during interrogation. He was suspected of involvement in ‘a plot to collect and conceal a large quantity of dangerous weapons, with the intention of using them for the perpetration of terrorist activity’.¹²⁹ The Court held:

Under these circumstances, in which the danger that led to the use of the special means in the interrogation was certainly real; the attack that the interrogation sought to prevent was serious harm to human life; the ISA interrogators had no other means for obtaining the information about the weapons stockpile hidden in a storage unit, and of the plans to perpetrate terrorist attacks; and the special means employed in the interrogation were... proportionate relative to the serious threat that their use was intended to frustrate – I am of the opinion that the finding of the Director that “employing the special means of

¹²² *Ibid* para. 34.

¹²³ *Ibid* para. 38.

¹²⁴ Mordechai Kremnitzer and Re’em Segev, ‘The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?’ (2000) 34 *Israel Law Review* 509, 541; Itamar Mann and Omer Shatz, ‘The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987–2009’ (2010) 6 *Unbound: Harvard Journal of the Legal Left* 59, 72.

¹²⁵ Itamar Mann, ‘The law behind torture’ *Boston Review* (15 December 2014) available at http://bostonreview.net/blog/itamar-mann-torture-necessity-legal-israel-united-states/?utm_source=Sprout&utm_medium=Social&utm_campaign=Twitter; see also, Mann and Shatz (n 124 above) 72.

¹²⁶ Yotam Berger, ‘Israeli High Court ruling may make it easier for interrogators to use violence’ *Haaretz* (30 November 2018) available at <https://www.haaretz.com/israel-news/.premium-israeli-high-court-ruling-may-make-it-easier-for-interrogators-to-use-violence-1.6701416>.

¹²⁷ *Tbeish v. Attorney General et al* HCJ 9018/17 (26 November 2018); *As’ad Abu Gosh et al v. Attorney General et al* HCJ 5722/12 (12 December 2017).

¹²⁸ *Tbeish v. Attorney General et al* HCJ 9018/17 (26 November 2018). See, Ben-Natan (n 34 above).

¹²⁹ *Tbeish* para. 59.

interrogation under the circumstances, falls within the purview of the necessity defense” is well founded.¹³⁰

Agreeing with Justice Elron, Justice I. Amit held:

The case before us is not one of a classic “ticking bomb” that may explode any minute, but...the immediacy requirement in...the Penal Law...concerns the immediacy of the act and not the immediacy of the danger. In the present case, the combination of the seriousness the nearly-certain danger (sic), if not the certainty of the realization of the danger, and the inability to act in an alternative manner in the concrete situation that faced the security authorities (the necessity condition) in order to obtain information that would very probably thwart a real danger of life-threatening terrorist activity – all lead to the conclusion that the proportionate act adopted by the ISA interrogators falls under the aegis of the necessity defense.¹³¹

The ticking bomb is the basis for a policy of torture – euphemised as special interrogation techniques – in Israel. The construct provides the imagery, the rationale and the justification for the use of torture. The judiciary, to date, has simply consolidated a ticking bomb-based ideology of torture.

The extensive commentary challenging the plausibility of the ticking bomb scenario and deconstructing ticking bomb logic might greet a decision like this with exasperation that this is not a real ticking bomb scenario or that this is evidence of the problem of the slippery slope. That approach mistakes an ideology of torture for some kind of wayward fuzzy logic. Torture by the state of Israel demonstrates fully the way in which the ticking bomb scenario is operationalised to neutralise the ideology of torture.

c. Adopting a stance: ‘Gotcha!’¹³²

The final point of departure, in the torture and ticking bomb debate, which merits cautious handling is the participation through an ‘in my view’ moral or ethical argumentative approach. Whilst the prospect of engaging in the debate on torture and the ticking bomb scenario by presenting moral or even legal arguments on one side or the other is alluring (and can generate very thoughtful work),¹³³ it is often a debate that gets nowhere.¹³⁴ One moral proposition or legal innovation trumps another and, along the way, the few who defend torture earn too many concessions from those who condemn it. In this respect, taking a position risks accepting a ticking bomb scenario as a legitimate starting point; even the most committed deontologist by, in any way, engaging with the ins and outs of the ticking bomb scenario has already had to make a compromise. More specifically, by entering ‘slippery slope’ territory, consequentialists

¹³⁰ *Tbeish* para. 59.

¹³¹ *Ibid*, Justice I. Amit, para. 2.

¹³² See, n 75 above. Luban (n 45 above) 1427. See also Waldron’s point that the hypothetical is designed ‘deliberately to undermine the integrity of certain moral positions’: Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681, 1715.

¹³³ For an interesting account of what is morally wrong with torture, for example, see, David Sussman, ‘What’s Wrong with Torture’ (2005) 33 *Philosophy and Public Affairs* 1.

¹³⁴ Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (University of Michigan Press, 2008) 175.

against torture concede the starting point – what happens on the slippery slope is portrayed as the problem.¹³⁵

In respect to the all too common approach of ethical inquiry into the purported moral dilemma of torturing in ticking bomb circumstances, abstraction is the governing frame of analysis. The ticking bomb ‘equivocates on what is relevant for consideration’ and erases awkward realities.¹³⁶ The commentator’s application of an ethical inquiry in this context doubly abstracts because the ethical analysis is rooted in moral intuitionism or a judgement-call about torture and about the ticking bomb; moral intuitionism and judgement calls about torture are necessarily subjective and learned, often from fictional depiction;¹³⁷ reflection on the ticking bomb is necessarily informed by the extent to which the topic of, and threat of, terrorism has dominated both the international and national agendas, and media coverage in recent years,¹³⁸ and the extent to which the idea of a ticking bomb suddenly exploding exploits ‘our greatest fears’.¹³⁹ Moral intuitionism on the use of torture in ticking bomb scenarios is, as such, ideologically primed, unconnected to reality and history.

2. ‘Interrogational Torture’: Misconstruing Context as Method

The very idea that torture may be understood as a method of interrogation, or categorised as ‘interrogational torture’, assumes there are different categories of torture according to the purpose for which it is being applied; it also suggests that these categories are distinct – they derive somehow from the character of the torturer – the professional interrogator, the sadist, the monster. In debates about the efficacy of torture and about the ticking bomb scenario, it is assumed that torture is a method of interrogation, and its success as a method is implied or assumed. This compartmentalisation of torture according to its purpose is, more often than not, taken for granted by those who debate torture in ticking bomb scenarios and ‘is accepted by both absolutists and apologists’.¹⁴⁰ The categorisation is pervasive in the literature;¹⁴¹ commentators have developed a kind of taxonomy of torture: there is interrogational torture, terroristic torture, judicial torture, punitive torture, sadistic torture, and deterrent torture

¹³⁵ See, for example, Sumner B. Twiss, ‘Torture, Justification and Human Rights: Toward an Absolute Proscription’ (2007) 29 Human Rights Quarterly 346, 360; Marcy Strauss, ‘Torture’ (2004) 48 New York Law School Law Review 201, 267;

¹³⁶ Farrell (n 4 above) 242.

¹³⁷ For a discussion of how public perception is informed by popular depiction of torture, see, Casey Delahunty and Erin Kearns, ‘Wait, there’s torture in Zootopia? Examining the Prevalence of Torture in Popular Movies’ February 2019 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3342908.

¹³⁸ On this point, see Lucia Zedner, ‘Securing Liberty in the Face of Terror: Reflections from Criminal Justice’ (2005) 32 Journal of Law and Society 507, 511.

¹³⁹ Lucia Zedner, ‘The Concept of Security: An agenda for comparative analysis’ (2003) 23 Legal Studies 153, 156. Zedner’s work on the concept of security is eye opening. She is particularly adept for our purposes at thinking through how security mediates the gulf between risk and our subjective feelings.

¹⁴⁰ Richard Matthews, ‘An empirical critique of “interrogational torture”’ (2012) 43 Journal of Social Philosophy 459.

¹⁴¹ For an example of the way in which torture is often categorised, see J. Jeremy Wisniewski, *Understanding Torture* (Edinburgh University Press, 2010) 7-8. His taxonomy of the types of torture lists: judicial; punitive; interrogational; dehumanizing; terroristic/deterrent; and sadistic torture. For some examples of the use of the distinct category of ‘interrogational torture’, see, Oren Gross, ‘The Prohibition on Torture and the Limits of the Law’ in Sanford Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004) 229, 232, using the term ‘preventive interrogational torture’; Stephan Kershner, ‘For Interrogational Torture’ (2005) 19 International Journal of Applied Philosophy 223; Kremnitzer and Segev (n 124 above) 509; Patrick Lee, ‘Interrogational Torture’ (2006) 51 American Journal of Jurisprudence 131; Sussman, (n 133 above) 4; Christopher Tindale, ‘The Logic of Torture: A critical examination’ (1996) 22 Social Theory and Practice 349, 350-351, categorising torture into ‘interrogational torture’, ‘deterrent torture’, and ‘dehumanising torture’.

amongst the categories. Interrogational torture, then, is not to be conflated with terroristic or sadistic torture.

Shue was misled by this approach in 1978. He distinguished ‘terroristic torture’ from ‘interrogational torture’. The former involved the always unjustifiable ‘goal of the intimidation of people other than the victim’.¹⁴² Interrogational torture, ‘for the purpose of extracting information’, could, in a pure case, ‘satisfy the constraint of possible compliance, since it offers an escape, in the form of providing the information wanted by the torturers, which affords some protection against further assault’.¹⁴³ Shue was sceptical of the ability of the victim to bring the torture to an end through compliance. Significantly, he also recognised that ‘very few instances of torture are likely to fall entirely within the category of interrogational torture’.¹⁴⁴ In making the latter point, Shue almost grasped a crucial, yet subtle, difference between interrogation as the context, or setting, for torture and torture as a method of interrogation. His observations were, however, overshadowed by his presentation of the possibility of pure interrogational torture in that rare, isolated case. In failing to fully let go of the ‘rare case’, he was precluded from differentiating between interrogation as the context for torture and interrogation as a justification for torture. Understanding this difference is essential to cracking the ‘enigmas of denial and bad faith encoded within the language we use to converse with ourselves’ about torture.¹⁴⁵ Indeed, given the interrogation room’s ubiquity as the setting for torture, almost all torture happens in an interrogational setting – but this environmental context is generally, and dangerously, substituted for method, purpose, and motive. The decision of the Bush administration policy-makers to rename torture ‘enhanced interrogation techniques’ was parasitic on this rationalisation of torture. What better way to represent and repackage torture than to use the language of enhanced *interrogation* – interrogation for information to stop a bomb.

Whilst much has been written about the objective of torture and about torture’s efficacy, few have really considered the way in which the rhetoric around torture creates an understanding of torture.¹⁴⁶ Words matter.¹⁴⁷ Torture is widely considered to be a method of interrogation because we call it a method of interrogation. Because they do not suit the narrative, are less intuitive and more difficult to grasp, accounts which complicate, and disrupt this reproduction of torture simply do not prevail. It is easier – more intuitive – to accept the categories.

Crelinsten, however, writing in a pre-11 September environment, did manage to articulate the complexity of torture. He saw that torture was understood to revolve around interrogation but, he argued, ‘it is more complex than this’.¹⁴⁸ Whilst perpetrators usually excuse their use of torture on the basis of the need to get information or a confession, Crelinsten identified in these excuses that there was more at stake than ‘making them talk’. Crelinsten saw that this excuse of “‘making them talk” is also about power, about imposing one’s will on another’.¹⁴⁹ Crelinsten advocated against the simplification of torture in to categories and torturers in to typologies. Crelinsten’s grasp of the complexity both of torture and of the torturer’s purposes means that he was able to decipher the debates about torture’s acceptability, in the post 11

¹⁴² Shue, Torture (n 8 above) 131.

¹⁴³ *Ibid*, 134.

¹⁴⁴ *Ibid*, 134.

¹⁴⁵ Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity, 2001) 116.

¹⁴⁶ See, however, *ibid*.

¹⁴⁷ See n 73 above.

¹⁴⁸ Ronald D. Crelinsten, ‘In Their Own Words: The World of the Torturer’ in Ronald D. Crelinsten and Alex P. Schmid (eds), *The Politics of Pain: Torturers and their Masters* (Westview Press, 1995) 35, 37.

¹⁴⁹ *Ibid* 37.

September environment, for what they were – an important element of the construction of a reality in which torture can be seen as acceptable: ‘To enable torture to be practised systematically and routinely, to be taken for granted and even to be celebrated, not only do torturers have to be trained and prepared, but wider elements of society must also be prepared and, in a sense, trained to accept that such things go on.’¹⁵⁰ So torturers needed to be trained – in the sense that they need to be conditioned to accept a new reality and made morally malleable to the dehumanisation of the enemy – and persuaded of the need for torture, in order that they can serve the interests of the state. Simultaneously, the public or society needs to be made amenable to torture. The production of torture as interrogational – purposeful and necessary in ticking bomb situations – is part of this ideological landscaping.

On the purposes or goals of torture, Asad has said:

Critics sometimes claim that ‘the extraction of information’ is not the real goal of torture, but rather torture’s justification. But I suggest that there is no such thing as ‘the *real* goal of torture’ The motives (conscious and unconscious) of someone who carries out specific acts of torture are usually varied and mixed. The idea that specific acts of torture should be understood by the agent’s motivation is either circular or based on the sentimental (and false) belief that only peculiar psychosocial types are capable of great cruelty.¹⁵¹

In making this point about the absence of a true goal of torture, Asad does seem to somewhat underestimate the significance of understanding information extraction as the justification for torture, rather than its purpose. This distinction between justification and purpose is essential to grasping the ideology of modern torture. It should not be assumed, though, that, by pursuing the exposure of ideology, there is an inevitable next step of pursuing, or discovering, truth; that is to say, by exposing the ideology we do not simply reveal the true goal of torture.¹⁵² However, on the whole, Asad’s observation is critical; he silences the sirens.¹⁵³ Asad’s decisive contribution is in his de-rationalisation of torture. The dominant rationalisation for torture today is on the basis of its supposed interrogational purpose – the assumption that torture is or can be a method of interrogation. But Asad topples the myth of the good torturer pursuing a particular goal. Our intuitions are primed to view the torture of a member of the political resistance in a dictatorial regime as entirely distinguishable from the torture of a ‘ticking bomb’ terrorist or a kidnapper in a liberal democracy. The distinguishing feature between these tortures, however, is our standpoint. The idea of interrogational torture as distinguishable from terroristic, sadistic, communicative or punitive torture is not sustainable under historical and contextual examination.

Klein, more sharply than many other thinkers, has grasped the function of torture. In attempting to convince a potential interviewee to speak to her – an interviewee who had experienced devastating psychological experimentation at the hands of researchers at McGill University in the 1950s – Klein explained her research interest in the interviewee as follows: ‘I recently travelled to Iraq, and I am trying to understand the role torture is playing there. We are told it’s about getting information, but I think it’s more than that – I think it may also have to do with trying to build a model country, about erasing people and then trying to remake them from

¹⁵⁰ Crelinsten does not mean training in the sense of learning techniques. He employs training more widely to denote the construction of a new social reality. Ronald Crelinsten, ‘How to Make a Torturer’ (2005) Index on Censorship 72.

¹⁵¹ Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003) 104.

¹⁵² Eagleton (n 68 above) 11.

¹⁵³ See, n 43 above.

scratch.’¹⁵⁴ Through her study of how the CIA used psychological experimental research (research which, in part, aimed at breaking down and rebuilding individuals who had mental health problems) in its development of an interrogation programme in the 1950s, and her observations on torture in Iraq and in the ‘war on terror’, Klein has understood torture as about unmaking bodies and minds, so that they can be remade or rebuilt. Klein’s understanding evokes the civilising mission: civilising the uncivilised, by breaking and remaking, through torture.

3. Torture and the Civilising Mission

This link between torture in Iraq and the civilising mission maps on to the wider reading of the 2004 invasion of Iraq, the underpinning Bush doctrine, and, indeed, the wider ‘war on terror’, as imperial in character, as ‘yet another version of the civilising mission’.¹⁵⁵ For Anghie, the identification of Iraq as a ‘rogue state’, ripe for liberation and transformation, the expansionist arguments around the use of force, encapsulated in the Bush doctrine’s policy of pre-emption, and the strategic engagement of rights arguments to justify the invasion, all demonstrate, and replicate, the old imperial order.¹⁵⁶ The imperial nature of the Bush doctrine, which included this expansionist interpretation of the rules on the use of force, and self-defence, is evidenced in the Third World’s exclusion from use of the doctrine whilst being subject to its application and elaboration.¹⁵⁷ The legal manoeuvres through which the ‘war on terror’ was established – including the Bush doctrine of self-defence, the reinterpretation of the ‘laws of armed conflict’, the rhetoric around ‘unlawful combatants’,¹⁵⁸ and the necessity exception to the laws prohibiting torture – were an exercise in legitimating war against an ‘uncivilised’ other.¹⁵⁹

This understanding of the ‘war on terror’ and the Iraq war echoes, and continues, the European conquest, and ‘civilisation’, of the ‘uncivilised’ world.¹⁶⁰ That conquest was legitimated through the civilising mission – the colonised were excluded from the universal, civilised norms or values of the colonial state, whilst being subject to their application and elaboration. As Anghie writes, the civilizing mission ‘has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe’.¹⁶¹ International law was both complicit in, and shaped by, the colonial encounter. It was used to legitimate colonialism and exploitation and colonial practices fed back in to its normative architecture.

A French concept,¹⁶² civilisation connotes the opposite to barbarianism; to civilise means to bring out of barbarism or savagery. The civilising mission is a French imperial doctrine. As France extended its colonial empire in the latter part of the 19th century, ‘French publicists, and subsequently politicians, declared that their government alone among the Western states had a special mission to civilise the indigenous peoples now coming under its control – what the

¹⁵⁴ Klein (n 44 above) 26.

¹⁵⁵ Anghie (n 39 above) 61.

¹⁵⁶ *Ibid* 61, 63, 65.

¹⁵⁷ *Ibid* 52.

¹⁵⁸ Frédéric Mégret, ‘From savages to ‘unlawful combatants’: a postcolonial look at international humanitarian law’s ‘other’ in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006).

¹⁵⁹ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2012) 298.

¹⁶⁰ *Ibid* 4.

¹⁶¹ *Ibid* 3.

¹⁶² Alice L Conklin, *A Mission to Civilise: The Republican Idea of Empire in France and West Africa, 1895-1930* (Stanford University Press, 1997) 1.

French called their *mission civilisatrice*, Conklin explains.¹⁶³ For those who supported the French empire and who were immersed in the idea of bettering ‘dependent peoples’, this was an enunciated creed.¹⁶⁴ But the French were not alone in this ideology. Other imperial powers shared this claim of bringing civilisation to the colonies.¹⁶⁵ As Fanon reveals, their claims rested on the ‘systematic negation of the other person and a furious determination to deny the other person all attributes of humanity’.¹⁶⁶

The civilising mission dovetailed with international law in Empire’s favour. Kiernan describes ‘the colonial scene, where no international law obtained’.¹⁶⁷ For the colonists, international law was unavailable to the colonial subject.¹⁶⁸ In international legal terms, the colony lacked legal personality and sovereignty, was incapable of partaking in international law, and, accordingly, imperial powers were free from the ‘legal constraints on the use of violence (to subjugate and pacify native populations) that bound them in their relationships with one another and their own metropolitan populations’.¹⁶⁹ International law was not absent. Colonial conquest was justified through international legal language. As such, international law was both universalised and shaped in a racialised context.¹⁷⁰ As the Third World Approaches to International Law scholarship has shown, the hierarchies and biases, formalised in the colonies persist in international law and institutions.¹⁷¹

The torture prohibition and the ticking bomb scenario are part of this history. The abolition of judicial torture in Europe was almost complete by the end of the eighteenth century.¹⁷² This history of abolition has been translated in to two fairy-tales, which, combined, have aided the construction of torture as aberrational, a violation of the norm. The first fairy-tale presents abolition as driven by enlightenment humanitarianism; the second fairy-tale has the happiest of endings – the near complete abolition of torture. In reality, *judicial* torture was abandoned as it was no longer required by the law of proof.¹⁷³ Torture continued, not least in the colonies.

In the era of decolonisation – and the overlapping era of human rights, the laws of armed conflict, and media and civil society scrutiny – it was difficult to justify torture on the basis of the necessity to civilise or pacify the racially inferior or savage colonial subject. It was certainly not possible to justify torture on the basis of the imperial need to create political subjects amenable to the retention of the colony. As such, the ticking bomb – the ‘interrogation’ of the lawless terrorist – became the face of the civilising mission. The ticking bomb justification for the use of torture crystallised in the colony. Torture at Abu Ghraib exposed this dark underbelly. But the state has a way of arguing away torture, burying its realities in the rotten

¹⁶³ *Ibid* 1.

¹⁶⁴ Martin Thomas, *Fight or Flight: Britain, France and their Roads from Empire* (Oxford University Press, 2014) 22.

¹⁶⁵ Conklin (n 162 above) 1. On Kenya, torture and the civilising mission, see generally, Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya* (Owl Books, 2005).

¹⁶⁶ Frantz Fanon, *The Wretched of the Earth* (Macgibbon and Kee, 1965) 203.

¹⁶⁷ V. G. Kiernan, *European Empires from Conquest to Collapse, 1815-1960* (Leicester University Press, 1982) 154.

¹⁶⁸ Elbridge Colby, ‘How to Fight Savage Tribes’ (1927) 21 *The American Journal of International Law* 279; See also, Kiernan (n 167 above) 146-166. Mégret (n 158 above)

¹⁶⁹ John Reynolds, *Empire, Emergency and International Law* (Cambridge University Press, 2017) 66.

¹⁷⁰ B. S. Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’ (2007) 8 *Melbourne Journal of International Law* 499, 501.

¹⁷¹ See Mukua Mutua and Anthony Anghie, ‘What is TWAIL?’ (2000) 94 *ASIL Proceedings* 31.

¹⁷² John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (University of Chicago Press, 2006 edn.) 10.

¹⁷³ *Ibid* 10-12.

apples and necessity exceptions. As with the practice of torture in the French-Algerian war, the state's narrative on Abu Ghraib predominated.

a. Translating the civilising mission in to ticking bomb: The French Algerian War

The practice of torture in Algeria is particularly useful both for understanding the infatuation with the ticking bomb scenario and for pouring cold water on that infatuation. However, despite the wealth of stellar research on torture during the French Algerian War and the Battle of Algiers, in particular, the torturer's perspective has prevailed. There are a couple of broad illustrations to support that claim.

First, the ticking bomb justification, which is so ubiquitous today, has its roots in the French Algerian war – it was during that war that this justification was most explicitly internalised and wielded.¹⁷⁴ In the aftermath of the war, the justification was truly conceptualised. Today, the ticking bomb scenario is a globalised construct. Less ubiquitous in contemporary debates is awareness of the systematic practice of torture, and the reasons for that brutal practice, by the French during the war.

Second, the sheer power of the French state both to censor voices and to amnesty crimes means that it was able to shape the discourse.¹⁷⁵ French torturers have been given numerous platforms to air their version of events. Following Algerian independence and the end of the war, military personnel took the opportunity to impart their experience, and knowledge, of perpetrating torture. French torturers gave advice and instruction in the United States,¹⁷⁶ Argentina¹⁷⁷ and other countries.¹⁷⁸ Victims, on the other hand, were silenced both during the war,¹⁷⁹ and in their

¹⁷⁴ Of course, the practice of torture was extensive throughout the colonies.

¹⁷⁵ As part of the Evian accords, signed in 1962, by French and Algerian representatives, amnesties were agreed for both sides; torture was not specifically mentioned in the accords. In 1968, the French parliament introduced a further law granting amnesty for all offences committed in connection with the war. See Yves Beigbeder, *Judging War Crimes and Torture: French Justice and International Tribunals and Commissions* (1940–2005) (Martinus Nijhof Publishers, 2006) 95–96; Marnia Lazreg, *Torture and the Twilight of Empire: From Algiers to Baghdad* (Princeton University Press, 2007) 1.

¹⁷⁶ Paul Aussaresses, renowned torturer and torture advocate, as well as General and Chief of Military Intelligence during the Battle of Algiers, was an instructor on counterinsurgency methods at Fort Bragg Army Training Centre in the United States in the early 60s. See, Beigbeder (n 175 above) 124; Bernard Harcourt, *The Counterrevolution: How Our Government Went to War Against its Own Citizens* (Basic Books, 2018) 45. Aussaresses showed up again in the United States, in 2002, on CBS' 60 minutes, alongside Alan Dershowitz, advocating for the use of torture, specifically against Zacarias Moussaaoui. See, the publisher's foreword in General Paul Aussaresses, *The Battle of the Casbah: Terrorism and Counter-Terrorism in Algeria 1955–1957* (Enigma Books, 2002) iii. The segment is no longer available on YouTube, likely because the General was convicted, in the French courts in 2002, for complicity in justifying war crimes, following the publication of what became in the English translation, *The Battle of the Casbah: Paul Aussaresses, Services Spéciaux: Algérie 1955–1957* (Paris: Perrin, 2001). See, Stiina Löytömäki, 'Legalisation of the Memory of the Algerian War in France' (2005) 7 *Journal of the History of International Law* 157.

¹⁷⁷ César Chelala, 'The French connection in the export of torture' *International Herald Tribune* (22 June 2001) available at <https://www.nytimes.com/2001/06/22/opinion/IHT-meanwhile-the-french-connection-in-the-export-of-torture.html>. See, also, Collard (n 21 above).

¹⁷⁸ Aussaresses was also an advisor in Brazil in the early 70s. French military personnel also served as advisors in Chile. See, Beigbeder (n 175 above) 124; Madeline Dobie, "'The Battle of Algiers'" at 50: From 1960s Radicalism to the Classes at Westpoint' *Los Angeles Review of Books* (25 September 2016) available at <https://lareviewofbooks.org/article/battle-algiers-50-1960s-radicalism-classes-west-point/>.

¹⁷⁹ *La Question*, Henri Alleg's celebrated account of his torture at the hands of the French military, published in 1958, had the dubious honour of being the first book banned by the French government since the eighteenth century, Henri Alleg, *The Question* (John Calder, 1958) xiv. Similarly, *Gangrene*, a collection of testimonies of Algerian torture victims, published in 1959, was banned and suppressed in France. See *Gangrene* (John Calder,

subsequent efforts to secure any kind of accountability.¹⁸⁰ Public opinion in France turned against the war, in part, because of the outcry at the use of torture; however, the outrage, arguably, failed to fill the public memory.

From the outset, the French state repressed the fresh memory of its activities in Algeria. The fact that torture in Algeria was both structural and approved by the highest authorities¹⁸¹ has only recently begun to be acknowledged.¹⁸² Official discourse mediated the history of torture – only when it had to – as aberrant, the work of individuals acting alone;¹⁸³ subsequent leaders failed to condemn the systematic practice of torture. Individual military personnel were, though, given spaces and opportunities to explain and justify their use of torture. All the while, public and popular discourse facilitated legitimisation through the image of the good torturer and the ticking bomb.¹⁸⁴ Historical amnesia in France has been accompanied by what Lazreg describes as the exercise of ‘monopoly over meaning’ enabling the empire ‘to reproduce itself, by deconstructing itself with one hand, and recomposing itself with the other’.¹⁸⁵

i. Towards torture: strategy, law, ideology

The use of torture by the French was underpinned by strategies of ‘revolutionary warfare’, advocated in particular by figures such as Trinquier, who Maran describes as having provided the French army with the ‘theoretical’ justifications for the use of torture. In Algeria, as elsewhere, euphemisms for the word torture were, unsurprisingly, employed.¹⁸⁶ Revolutionary warfare established that the violence of terrorism countenanced an equivalently violent response and that information about the terrorist’s next move was essential to thwart the random attacks, justifying coercion.¹⁸⁷ French theories of revolutionary warfare later migrated to the United States.¹⁸⁸

In his memoirs, *La Vraie Bataille*, Massu, commander of French forces in Algeria during the Battle of Algiers, acknowledged the use of torture, though he disputed both its severity and the extent to which it was used; he went to great lengths, however, to justify its use in reference to the necessity of gaining ‘urgent operational information’.¹⁸⁹ His men tortured thousands.¹⁹⁰

1959). French censorship was not successful at the time; it really only added to public interest, as Maran explains. Maran (n 38 above) 171.

¹⁸⁰ As one high profile example, Josette Audin spent 61 years demanding that the French state accept responsibility for the death in custody in 1957, through torture, of her husband, Maurice Audin. In September 2018, to media shock, Emmanuel Macron sent a letter to the Audin family, apologising on behalf of the French state. ‘Déclaration du Président de la République sur la mort de Maurice Audin’ 13 September 2018 available at <https://www.elysee.fr/emmanuel-macron/2018/09/13/declaration-du-president-de-la-republique-sur-la-mort-de-maurice-audin>.

¹⁸¹ Branche, ‘Torture of Terrorists?’ (n 48 above) 547,

¹⁸² Angelique Chrisafis, ‘France admits systematic torture during Algeria war for the first time’ The Guardian (13 September 2018) available <https://www.theguardian.com/world/2018/sep/13/france-state-responsible-for-1957-death-of-dissident-maurice-audin-in-algeria-says-macron>.

¹⁸³ Löytömäki (n 176 above) 171.

¹⁸⁴ For example, Jean Lartéguy, *Les Centurions* (Paris: Presses de la Cité, 1960).

¹⁸⁵ Lazreg (n 175 above) 2.

¹⁸⁶ Maran (n 38 above) 82. It is worth noting that France had, at this stage, been heavily involved in the drafting of the European Convention on Human Rights, which contains the Art 3 prohibition on torture. France signed the treaty on the day that it opened for signature, 4 November 1950, but it did not ratify the treaty until 3 May 1974.

¹⁸⁷ *Ibid* 82.

¹⁸⁸ Harcourt (n 176 above) 45.

¹⁸⁹ Maran (n 38 above) 101-102.

¹⁹⁰ Martin Evans, *Algeria: France’s Undeclared War* (Oxford University Press, 2012) 206.

Unambiguously referencing revolutionary warfare, he saw the savagery of the enemy as having compelled their ferocious response. Massu's outlook signifies and continues a deep history, exposed by Mégret, of anthropologising the savage as '*incapable of showing restraint in warfare*'.¹⁹¹ In an about turn, in 2000, in an interview in *Le Monde*, Massu expressed his regret at the use of torture in Algeria, admitting that it had been not been useful or necessary and acknowledging that things could have been done differently.¹⁹²

Aussaresses illustrates how justificatory logic circulated within the police and intelligence forces. He narrates a conversation in Philippeville, in which a police officer confronted him with a ticking bomb-like dilemma, as the turning point in his own attitude towards the necessity of torture.¹⁹³ Although Aussaresses resolutely defended his actions, on the basis of urgency and necessity, until the end of his life, his own memoirs depict torture in Algeria as a routine method of 'intelligence-gathering' and the necessity justification as a defence mechanism internalised by a brutal, remorseless, torturer.

So-called revolutionary warfare was facilitated within a legal regime characterised by emergency powers, providing 'the executive with an almost totalitarian mandate to introduce by administrative order any form of repressive measures it saw fit'.¹⁹⁴ Although 'the army was in charge', by 1957, when police powers were transferred by Lacoste to the military, under Massu,¹⁹⁵ the 'conflict' was, nevertheless, treated, by France as an internal affair – an insurrection or revolution; the opposition were cast as terrorists or outlaws.¹⁹⁶ Absent sovereignty, and incapable anyway of obeying it, according to French thinking, the Algerians did not benefit from international humanitarian law. Combatant status simply did not apply.

Revolutionary warfare and emergency powers were deadly bedfellows. It was the civilising mission, however, that provided the ideological pillar in the violent trilogy that allowed systematic torture against the Algerians. Revolutionary warfare encouraged justificatory thinking and emergency powers permitted the French forces to place the FLN and other detainees outside of any protective legal order. But the civilising mission drove French policy.

For the French, Algeria was the 'lynchpin of the French empire', its jewel, its most intimate colonial conquest. Algeria was France.¹⁹⁷ The government and military claimed that, in Algeria, the French were upholding the 'highest principles of the French republican tradition';¹⁹⁸ French

¹⁹¹ Mégret (n 158 above) 289.

¹⁹² Jean Planchais and Florence Beaugé, 'Jacques Massu, Le général repent' *Le Monde* (22 May 2008) available: https://www.lemonde.fr/le-monde-2/article/2008/05/22/jacques-massu-le-general-repent_1048161_1004868.html; see also Farrell (n 4 above) 100.

¹⁹³ Aussaresses, *Services Spéciaux* (n 176 above) 31. He writes:

Imagine a situation in which you are opposed in principle to the use of torture and you have arrested an individual who is clearly involved in the preparation of an attack. the suspect refuses to talk. You do nothing. As a result, a particularly deadly attack ensues. What would you say to the parents of the victims, for example, to the parents of a child, mutilated by the bomb, to justify the fact that you failed to do whatever possible to make the suspect talk? (author's translation).

¹⁹⁴ Neil MacMaster, 'Torture: from Algiers to Abu Ghraib' (2004) 46 *Race & Class* 1, 6. For a detailed explanation of the legal framework in place as well as the use, and effect, of emergency powers in Algeria during the war, see Farrell (n 4 above) 84-95.

¹⁹⁵ Farrell (n 4 above) 7.

¹⁹⁶ Eldon van Cleef Greenberg, 'Law and the Conduct of the Algerian Revolution' (1970) 11 *Harvard International Law Journal* 37, 44.

¹⁹⁷ Jennifer E. Sessions, *By Sword and by Plow: France and the Conquest of Algeria* (Cornell University Press, 2011) 2, 8, 9.

¹⁹⁸ Evans (n 190 above) 206.

civilisation, in short. Their mission, as they saw it, was to establish peace in Algeria, to bring social and economic reform, to liberate the Algerians.¹⁹⁹ It may seem contradictory to suggest that the civilising mission drove French torture, especially given the centrality of *les droits de l'homme* and the French Declaration to 'French civilisation'. To understand the civilising mission, it is necessary to come to terms with the dehumanising logic of colonialism and with the intersection of colonialism and rights. Torture was necessary in defence of France, of civilisation, of Christian values. Maran, in her outstanding examination of the civilising mission in the discourse of French government and military personnel, concluded: 'The shared understanding was that France's presence in Algeria was philanthropic, bringing civilisation to Algerians...not least through notions of rights. When this process was disrupted by the Algerian revolution, the government acting through its military...took the position that unusual means were justified to restore order.'²⁰⁰ Within a racialised settler hierarchy,²⁰¹ for most, torture was also permissible, necessary even, because the adversary, long constructed as, non-equal, was not yet fully civilised, not yet fully human. Asad's evocative words connect the dots between torture and the colonised subject: 'Pain endured in the movement toward becoming "fully human," ...was necessary, in the sense that there were social or moral reasons why it had to be suffered'.²⁰² Torture was part of the process of creating new human subjects.

Ticking bomb-like thinking and rationalising became rife in the French Algerian war. Such logic was pressed into service as part of the civilising mission. French torture was systematic, widespread and brutal. That the ticking bomb scenario is the thriving memento of that history of torture is a damning indictment of our failure to come to terms either with why torture was practised in Algeria and elsewhere or with the colonial encounter, its remnants, transnationalism and 'boomerang effect'.²⁰³

Conclusion

The many histories of torture overwhelmingly elucidate it as a practice that looks nothing like the apologetic portrayal du jour.²⁰⁴ Yet it is the slick assembly of a worthy professional, doing only what is necessary, with managed violence, to the reticent terrorist, to stop the bomb which has come to dominate our understanding; that is to say, this is the understanding of torture as perpetrated by the United States, France, Israel and other 'western' states – the practice of torture by dictatorships is viewed differently, through a more medieval lens.

Rejali, reflecting on the erasure of the histories and the realities of torture, wondered how the ticking bomb scenario is able to bend all argument – and history – to its narrative.²⁰⁵ We can continue to reach answers to Rejali's urgent question by exploring the complex interplay of Empire and ideology. Just as – through the act of torture – the victim is broken and remade,

¹⁹⁹ *Ibid* 155-159, 193.

²⁰⁰ Maran (n 138 above) 188.

²⁰¹ Richard C. Keller, *Colonial Madness: Psychiatry in French North Africa* (University of Chicago Press, 2007) 4.

²⁰² Asad (n 151 above) 113.

²⁰³ On the imperial boomerang effect, see Reynolds (n 169 above) 31; Césaire (n 2 above).

²⁰⁴ There are many excellent histories and genealogies of torture. There is insufficient space to list the more specific country and case-based studies. For a more general account, however, there is no better work than Edward Peters, *Torture* (University of Pennsylvania Press, 1999). The history of torture in the Middle Ages cannot be understood without recourse to Langbein. For a short introduction see, John H. Langbein, 'The Legal History of Torture' in Sanford Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004). Rejali has produced an unparalleled history of modern torture, see Rejali, *Torture and Democracy* (n 15 above).

²⁰⁵ Rejali, *Torture and Democracy* (n 15 above) 547.

civilised, in the eyes of the torturer, so too the history of torture is erased and rebuilt, civilised, in the eyes of its authors. The remnants of the colonial encounter are visible everywhere, in practices of torture, in discussions on torture and in the law prohibiting torture.

In the recent history of US torture, parallels and links to the French Algerian war abound. There were similarities in strategy – warfare, characterised by pre-emptive force necessitated by the novelty of the threat;²⁰⁶ in law – the use of emergency powers and the removal of legal protection and status, placing the ‘terrorists’ beyond the law; and in ideology – the logic of interventionism to liberate and to bring democracy, to defend and extend ‘civilisation’.²⁰⁷ The Bush administration worked hard to construe their actions as within the bounds of legality, through definitional gymnastics, and reliance on necessity. That history of torture has, nevertheless, been examined through the lens of ticking bombs and justificatory or necessity logic. Far less attention has been given to the racialised, civilising nature of American conduct.

The same can be said of the academic and popular attention given to the ticking bomb scenario. There has been much frenzied typing about this so-called dilemma. Many have accepted the construct at face value, failing to grasp the civilising ideology that it conceals. There are interlocking reasons for the lethargy in understanding torture. Torture is misunderstood today as being for the purpose of obtaining information; there is an utter failure to understand this as its justification. Part of the problem lies in the way that the internationally accepted definition of torture has reified this justification in law.²⁰⁸ On top of that, we are ‘living within the lie’.²⁰⁹ As Cohen has argued in respect of our ability to ignore atrocities and suffering, ‘a cultural of denial is in place’.²¹⁰ Justifications for torture, like the ticking bomb, are part of this denial; they ‘have been offered and accepted long enough to be part of the moral fabric’.²¹¹ The ticking bomb scenario provides a simple and persuasive construct. The construct allows apologists to substitute deeply held ideologically beliefs for more acceptable theories of necessity. It allows the quieter majority an alternative to subjecting their governments, their values, their civilisation to the relentless critique they require.

It was really only in the closing stages of the French Algerian war that the ticking bomb scenario was fully formalised in its contemporary, beguiling, urgent construct. Suitably, the construct was first set out in a work of fiction,²¹² Lartéguy’s *Les Centurions*. Inspired by events in the French Algerian war, *Les Centurions* erases the intimate connection between the ticking bomb and the civilising mission. It was far easier to memorialise torture in Algeria, as the novel attempts to, through the lens of the good guy, stopping bombs, conscientiously.

The ticking bomb scenario conceals the civilising mission, an ideology underpinned by racial hatred and dehumanisation. When asked, then, what would do in a ticking bomb situation, it may be best to remember, before wading in, that you are being asked to perpetuate an ideology of torture.

²⁰⁶ Robert Knox, ‘Civilising interventions: Race, war and international law’ (2013) 26 Cambridge Review of International Affairs 111, 113

²⁰⁷ Deepa Kumar, ‘Framing Islam: The Resurgence of Orientalism during the Bush Era II’ (2010) 34 Journal of Communication Inquiry 254, 259-260.

²⁰⁸ UNCAT (n 36 above) Article 1(1).

²⁰⁹ Cohen citing Havel (n 145 above) 115.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Rejali, *Torture and Democracy* (n 15 above) 546.

Bibliography

- Alleg, Henri, *The Question* (John Calder, 1958).
- Anghie, Anthony 'The War on Terror and Iraq in Historical Perspective' (2005) 43 *Osgoode Hall Law Journal*, 44.
- Anghie, Anthony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2012).
- Asad, Talal, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003).
- Association for the Prevention of Torture, 'Defusing the Ticking Bomb Scenario: Why We Must Say No To Torture, Always' (Geneva: Association for the Prevention of Torture, 2007).
- Aussaresses, Paul, *Services Spéciaux: Algérie 1955–1957* (Paris: Perrin, 2001).
- Beigbeder, Yves, *Judging War Crimes and Torture: French Justice and International Tribunals and Commissions (1940–2005)* (Martinus Nijhof Publishers, 2006).
- Ben-Natan, Smadar, 'Revise your Syllabi: Israeli Supreme Court Upholds Authorisation for Torture and Ill-Treatment (2019) 10 *Journal of International Humanitarian Legal Studies* 41.
- Branche, Raphaëlle, 'Torture of Terrorists? Use of Torture in a "War Against Terrorism": Justification, Methods and Effects: the Case of France in Algeria, 1954–1962' (2007) 89 *International Review of the Red Cross* 543.
- Brecher, Bob, *Torture and the Ticking Bomb* (Blackwell Publishing, 2007).
- Buescher, Derek, 'Exceptional Torture: Torture Imagery as Neocolonial Rhetoric' in Rae Lyn Schwartz-DuPré (ed), *Communicating Colonialism: Readings on Postcolonial Theory(s) and Communications* (Peter Lang, 2014).
- Caldwell, Ryan Ashley, *Fallgirls: Gender and the Framing of Torture at Abu Ghraib* (Ashgate, 2012).
- Césaire, Aimé (Joan Pinkham trans), *Discourse on Colonialism* (Monthly Review Press, 2000).
- Chimni, B S, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melbourne Journal of International Law* 499,
- Cohen, Stanley, *States of Denial: Knowing about Atrocities and Suffering* (Polity, 2001).
- Colby, Elbridge 'How to Fight Savage Tribes' (1927) 21 *The American Journal of International Law* 279.
- Collard, Melanie, *Torture as State Crime: A Criminological Analysis of the Transnational Institutional Torturer* (Routledge, 2018).
- Conklin, Alice L, *A Mission to Civilise: The Republican Idea of Empire in France and West Africa, 1895–1930* (Stanford University Press, 1997).
- Connell R W, *Masculinities* (2nd ed. Polity, 2005).
- Crelinsten, Ronald D, 'How to Make a Torturer' (2005) *Index on Censorship* 72.
- Crelinsten, Ronald D, 'In Their Own Words: The World of the Torturer' in Ronald D. Crelinsten Ronald D, and Alex P Schmid (eds), *The Politics of Pain: Torturers and their Masters* (Westview Press, 1995).
- Delahunty, Casey and Erin Kearns, 'Wait, there's torture in Zootopia? Examining the Prevalence of Torture in Popular Movies' February 2019 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3342908.
- Eagleton, Terry, *Ideology: An Introduction* (Verso, 1991, 2007 edn).
- Elkins, Caroline, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Owl Books, 2005).
- Evans, Martin, *Algeria: France's Undeclared War* (Oxford University Press, 2012).
- 'Excerpts of the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity' (1989) 23 *Israel Law Review* 146.
- Fanon, Frantz, *The Wretched of the Earth* (Macgibbon and Kee, 1965).
- Farrell, Michelle, *The Prohibition on Torture in Exceptional Circumstances* (Cambridge University Press, 2013).
- Freeden, Michael, *Ideologies and Political Theory: A Conceptual Approach* (Oxford University Press, 1996).

- Gangrene (John Calder, 1959).
- Ginbar, Yuval, *Why not torture terrorists? Moral, practical, and legal aspects of the 'ticking bomb' justification for torture* (Oxford University Press, 2008).
- Greenberg, Karen J and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2004).
- Greer, Steven, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gäfgen Case' (2011) 11 Human Rights Law Review 67.
- Greer, Steven, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15 Human Rights Law Review 101
- Gross, Oren, 'The Prohibition on Torture and the Limits of the Law' in Sanford Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).
- Hannah, Matthew, 'Torture and the Ticking Bomb: the War on Terrorism as a Geographical Imagination of Power/Knowledge' (2006) 96 Annals of the Association of American Geographers 622.
- Harbury, Jennifer, *Truth, Torture and the American Way: The History and Consequences of US Involvement in Torture* (Beacon Press, 2005).
- Harcourt, Bernard, *The Counterrevolution: How Our Government Went to War Against its Own Citizens* (Basic Books, 2018).
- Hersh, Seymour M, 'The Gray Zone: How a Secret Pentagon Program came to Abu Ghraib' The New Yorker (16 May 2014).
- Kahn, Paul W, *Sacred Violence: Torture, Terror, and Sovereignty* (University of Michigan Press, 2008).
- Kaufman-Osborn, Timothy 'Gender Trouble at Abu Ghraib?' (2005) 1 Politics & Gender 597.
- Kelman, Herbert C, 'The Policy Context of Torture: A Social-Psychological Analysis' (2005) 87 International Review of the Red Cross 123.
- Kershner, Stephan, 'For Interrogational Torture' (2005) 19 International Journal of Applied Philosophy 223.
- Khalili, Laleh, 'Gendered Practices of Counterinsurgency' (2011) 37 Review of International Studies 1471.
- Kiernan, V G, *European Empires from Conquest to Collapse, 1815-1960* (Leicester University Press, 1982).
- Klein, Naomi, *The Shock Doctrine* (Penguin 2007).
- Knox, Robert, 'Civilising interventions: Race, war and international law' (2013) 26 Cambridge Review of International Affairs 111.
- Kremnitzer, Mordechai and Re'em Segev, 'The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?' (2000) 34 Israel Law Review 509.
- Kumar, Deepa, 'Framing Islam: The Resurgence of Orientalism during the Bush Era II' (2010) 34 Journal of Communication Inquiry 254.
- Langbein, John H, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (University of Chicago Press, 2006 edn.).
- Langbein, John H, 'The Legal History of Torture' in Sanford Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004).
- Lartéguy, Jean, *Les Centurions* (Paris: Presses de la Cité, 1960).
- Lazreg, Marnia, *Torture and the Twilight of Empire: From Algiers to Baghdad* (Princeton University Press, 2007).
- Lee, Patrick, 'Interrogational Torture' (2006) 51 American Journal of Jurisprudence 131.
- Levinson, Sanford, '"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11' (2003) 81 Texas Law Review 81 2013.
- Löytömäki, Stiina, 'Legalisation of the Memory of the Algerian War in France' (2005) 7 Journal of the History of International Law 157.
- Luban, David, 'Liberalism, Torture and the Ticking Bomb' (2005) 91 Virginia Law Review 1425.
- MacMaster, Neil, 'Torture: from Algiers to Abu Ghraib' (2004) 46 Race & Class 1.
- Mann, Itamar and Omer Shatz, 'The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009' (2010) 6 Unbound: Harvard Journal of the Legal Left 59.
- Maran, Rita, *Torture: The Role of Ideology in the French Algerian War* (Praeger, 1989).

- Marks, Susan, 'Big Brother is Bleeping Us – With the Message that Ideology Doesn't Matter' (2001) 12 *European Journal of International Law* 109.
- Matthews, Richard, 'An empirical critique of "interrogational torture"' (2012) 43 *Journal of Social Philosophy* 459.
- Mavronicola, Natasa, 'Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law: A Reply to Steven Greer' (2017) 17 *Human Rights Law Review* 479.
- Mavronicola, Natasa, 'Torture and Othering' in Benjamin J Goold and Liora Lazarus (eds.), *Security and Human Rights* (2nd ed. Hart Publishing, 2019) 27.
- McCoy, Alfred W, *A Question of Torture: CIA Interrogation, From the Cold War to the War on Terror* (Metropolitan Books, 2006).
- Mégret, Frédéric 'From savages to 'unlawful combatants': a postcolonial look at international humanitarian law's 'other'' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press, 2006).
- Mutua, Mukua and Anthony Anghie, 'What is TWAIL?' (2000) 94 *ASIL Proceedings* 31.
- O' Mara, Shane, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Harvard University Press, 2015).
- Peters, Edward, *Torture* (University of Pennsylvania Press, 1999).
- Pringle, Yolana, 'Humanitarianism, Race and Denial: The International Committee of the Red Cross and Kenya's Mau Mau Rebellion, 1952-60' (2017) 84 *History Workshop Journal* 89.
- Puar, Jasbir, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2017).
- Pythian, Mark, 'An INS Special Forum: The US Senate Select Committee Report on the CIA's Detention and Interrogation Program' (2016) 31 *Intelligence and National Security* 8.
- Rejali, Darius, 'Torture makes the man' (2007) 24 *South Central Review* 151.
- Rejali, Darius, *Torture and Democracy* (Princeton University Press, 2007).
- Reynolds, John, *Empire, Emergency and International Law* (Cambridge University Press, 2017).
- Rizzo, John, *Company Man* (Scribe, 2014).
- Rodley, Nigel S, *The Treatment of Prisoners under International Law* (2nd ed. Oxford University Press, 1999).
- Rodriguez, Jose A, *Hard Measures: How Aggressive C.I.A Actions after 9/11 Saved American Lives* (Threshold Editions, 2012).
- Rumsfeld, Donald, *Known and Unknown: A Memoir* (Sentinel, 2012)
- Sands, Phillippe, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008).
- Scarry, Elaine, 'Five Errors in the Reasoning of Alan Dershowitz' in Sanford Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004).
- Scharf, Michael P and Paul R Williams, *Shaping Foreign Policy in Times of Crisis* (Cambridge University Press, 2010).
- Scheppele, Kim Lane, 'Hypothetical Torture in the War on Terrorism' (2005) 1 *Journal of National Security Law and Policy* 285.
- Senate Select Committee on Intelligence, 'The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program' (Melville House, Brooklyn, London, 2014).
- Sessions, Jennifer E, *By Sword and by Plow: France and the Conquest of Algeria* (Cornell University Press, 2011).
- Shue, Henry, *Torture in Dreamland: Disposing of the Ticking Bomb* (2006) 37 *Case Western Reserve Journal of International Law* 231.
- Shue, Henry, *Torture*, (1978) *Philosophy and Public Affairs* 124.
- Shue, Henry, 'Book Review: Why Torture Doesn't Work: The Neuroscience of Interrogation: by Shane O' Mara' (2016) 37 *Political Psychology* 753.
- Strauss, Marcy, 'Torture' (2004) 48 *New York Law School Law Review* 201, 267;
- Sturken, Marita, 'Comfort, irony and trivialisation: The mediation of torture' (2011) 14 *International Journal of Cultural Studies* 423
- Sussman, David, 'What's Wrong with Torture' (2005) 33 *Philosophy and Public Affairs* 1.

- Thaler, Mathias, *Naming Violence: A Critical Theory of Genocide, Torture, and Terrorism* (Columbia University Press, 2018).
- Thaler, Mathias, 'Unhinged Frames: Assessing Thought Experiments in Normative Political Theory' (2018) 48 *British Journal of Political Science* 1119.
- Thomas, Martin, *Fight or Flight: Britain, France and their Roads from Empire* (Oxford University Press, 2014).
- Thompson, John B, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Polity Press, 1990).
- Tindale, Christopher, 'The Logic of Torture: A critical examination' (1996) 22 *Social Theory and Practice* 349.
- Twiss, Sumner B., 'Torture, Justification and Human Rights: Toward an Absolute
- van Cleef Greenberg, Eldon, 'Law and the Conduct of the Algerian Revolution' (1970) 11 *Harvard International Law Journal* 37.
- Vladeck, Stephen I, 'The Torture Report and the Accountability Gap' (2015) Summer/Fall *Georgetown Journal of International Affairs* 174.
- Waldron, Jeremy, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 *Columbia Law Review* 1681.
- Waldron, Jeremy, *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010).
- Wisniewski, J Jeremey, *Understanding Torture* (Edinburgh University Press, 2010).
- Zedner, Lucia, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society* 507.
- Zedner, Lucia, 'The Concept of Security: An agenda for comparative analysis' (2003) 23 *Legal Studies* 153.
- Zurbriggen, Eileen L, 'Sexualised torture and abuse at Abu Ghraib prison: Feminist Psychological Analysis' (2008) 18 *Feminism and Psychology* 301.